82-2128

No. 82-

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

vs.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Second Circuit sustained a $276,000,000 ($276 million) antitrust judgment against a regulated telephone company for engaging in constitutionally protected speech. Its holding flatly conflicts with the decisions of this Court, with the legal standards applied by other courts of appeals, and with Judge Harold Greene's decision on identical evidence in a parallel Government antitrust action. The case presents fundamental and vitally important questions under the First Amendment and the *Noerr-Pennington* doctrine:

(1) whether a public speech and pleadings filed in a legislative rulemaking proceeding can be penalized as a "sham" or as outside the First Amendment where:

(a) the agency initiated the proceeding and the telephone company merely participated by advocating a position on which the agency had invited comments;

(b) the telephone company urged the continuation of existing regulations and its arguments comported with the positions of FCC Commissioners Benjamin Hooks and James Quello, a Federal-State Joint Board, numerous state regulatory commissions, and the National Academy of Sciences;

(c) the telephone company's advocacy was condemned because it was not completely successful; because its arguments were statements of opinions that rested in part on circumstantial evidence, not scientific proof; and because certain "inferences" were drawn from normal incidents of legitimate advocacy?

Three related questions are also raised:

(2) whether, under the *Noerr-Pennington* doctrine, a case can be submitted to a jury under a preponderance of the evidence instruction that does not explicitly state that advocacy is protected, regardless of anticompetitive purposes?

(3) whether the Sherman Act can be violated when a regulated firm files a tariff that is consistent with historic regulatory policies, that is repeatedly held to comply with existing state and federal regulations, and that is ultimately *prescribed* by the agency for certain equipment?

(4) whether, under the "filed tariff" doctrine of *Keogh* v. *Chicago & Northwestern R.R.*, 260 U.S. 156 (1922), telephone company customers can bring private treble damages actions to recover payments made under filed tariffs?

STATEMENT REQUIRED BY RULE 28.1

Petitioners Western Electric Company, Bell Telephone Laboratories, New York Telephone Company, New Jersey Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Ohio Bell Telephone Company, Southwestern Bell Telephone Company, Pacific Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company are each wholly-owned subsidiaries of petitioner American Telephone and Telegraph Company ("AT&T"). In addition to its other wholly-owned subsidiaries, AT&T has ownership interests in the Southern New England Telephone Company, Cincinnati Bell, Incorporated, and the Cuban American Telephone and Telegraph Company.

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FEDERAL REGULATORY DECISIONS

STATE REGULATORY DECISIONS

STATUTES AND REGULATIONS

No. 82-

IN THE

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October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

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LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 2a-91a) is reported at 700 F.2d 785. The order of the Court of Appeals denying the petition for rehearing, with suggestion for rehearing in banc (App. D, 134a), is unreported. The District Court decision denying the motion to dismiss and for partial summary judgment (App. B, 94a-127a) is reported at 487 F.Supp. 942, and its decision denying the motion for judgment notwithstanding the verdict or for a new trial (App. C, 130a-131a) is reported at 525 F.Supp. 154. Pertinent portions of the trial court record are reproduced in Appendix E. Because of their importance, the Appendix also reproduces three opinions of the Federal Communications Commission ("FCC"): *AT&T "Foreign Attachment" Tariff Revisions,* 15 F.C.C.2d 605 (1968) (App. F, 161a-174a); *Notice of Inquiry and Rulemaking, (Docket No. 19528),* 35 F.C.C.2d 539 (1972) (App. G, 175a-180a); and *Supplemental Notice of Inquiry and Rulemaking, (Docket No. 19528),* 40 F.C.C.2d 315 (1973) (App. H, 181a-186a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1983. A timely petition for rehearing, with suggestion for rehearing in banc, was denied on March 31, 1983. App. 134a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances."

The pertinent provisions of the Sherman Act, 15 U.S.C. §§1 *et seq.*, the Communications Act of 1934, 47 U.S.C. §§151 *et seq.* and the Code of Federal Regulations are reproduced in Appendix I.

STATEMENT OF THE CASE

In this case, the Second Circuit affirmed a $276,000,000 ($276 million) treble damages judgment against petitioners ("Bell"). It held that a jury had permissibly found that Bell had monopolized the markets for two types of telephone instruments used by business customers, Private Branch Exchanges (PBXs)[1] and key telephone systems,[2] and had caused respondents ("Litton")—which had entered these markets in 1971 and initially been very successful—to exit from them in 1974.

The basis for this extraordinary $276 million judgment is that, in 1973, Bell exercised its constitutional right to express its opinion on matters of fundamental public importance by making a public speech and by filing pleadings in an FCC-initiated rule-

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[1]A PBX includes a switchboard and a number of extension telephones. The PBX can switch calls from one extension telephone to another as well as permit outside calls to be placed and received.

[2]A key telephone system includes telephone sets with buttons or keys and certain common equipment. The keys give each telephone set access to more than one telephone line.

making proceeding. Bell there argued, on the basis of long-standing public interest concerns and in accordance with the positions of numerous disinterested public representatives, that it would not be in the public interest to order, in the FCC's words, a "basic and substantial change" in monopoly telephone service (App. 176a) by permitting customers to substitute equipment outside the control of telephone companies for integral parts of the telephone network. Instead, Bell urged the continuation of tariffs previously filed in 1968 which allowed telephone customers to provide their own PBXs, key telephone systems, and other telephone instruments, subject to the requirement that telephone companies supply a protective connecting arrangement ("PCA") that performs network control signalling functions essential to the operation of the telephone network.

I. The Regulatory Background.

The Second Circuit's decision ultimately rests on a serious misapprehension of the First Amendment and the *Noerr-Pennington* doctrine, and upon a single erroneous premise about the regulatory history. In the Second Circuit's view, one permissible "version" of this history is that the FCC's decision on reconsideration in *Carterfone*, 14 F.C.C.2d 571 (1968), made it "clear as a bell" that franchised telephone monopolies no longer included telephone instruments or associated equipment and that no company could prohibit the connection of any such customer-provided equipment to the network "absent a showing of actual harm." App. 15a-16a, 50a-51a. Because Bell had no scientific proof that customer-owned PBXs or key systems were invariably harmful, the Court of Appeals held that both Bell's filing and subsequent advocacy of the PCA tariff and Bell's opposition to certification could be found to violate the "mandate in *Carterfone*" and to be "baseless" and a "sham." App. 51a.

The premise of the Court of Appeal's decision is simply false. The FCC's decision in *Carterfone* did not redefine the franchised telephone monopolies to exclude PBXs, key systems, or other telephone instruments. Bell's 1968 "post-*Carterfone*" tariffs were repeatedly held to comply with existing state and federal regula-

tions between 1968 and 1975. Indeed, the FCC never held that the PCA requirement had been illegal; on the contrary, it ultimately *prescribed* the PCA for all uncertified equipment. In deciding whether to go beyond *Carterfone* and redefine the franchised telephone monopolies, the FCC's rulemaking proceeding focused on a broad range of fundamental public policy issues in addition to whether customer-provided equipment could cause network harm. A summary of the regulatory background will place the issues in context.

State and Federal Regulation. Telephone service is subject to concurrent state and federal regulation. State utility commissions regulate intrastate service and have granted franchised monopolies in exclusive certificated areas to Bell companies and more than 1,600 independent telephone companies. Facilities used to provide interstate service are regulated by the FCC.

The regulated telephone network consists of central switching systems, the cables and other transmission facilities that link them to homes and businesses, and telephone instruments and associated signalling equipment located on each customer's premises. This "customer premises equipment" is an essential and interactive part of the network. Telephone instruments convert the human voice into the electrical signals which can be transmitted over the network. Network control signalling equipment associated with telephone instruments emits the electrical impulses into the network that activate the central switching systems and direct and control the network functions essential to its operation.

Because efficient service requires precise coordination, standardization, and control of all components of the network, two related regulatory policies have governed telephone service. First, the franchised monopoly was historically defined as end-to-end telephone service. Telephone companies were required to own, install, maintain, and control all telephone network equipment within their certificated areas, including telephone instruments. State commissions uniformly *prohibited* telephone companies from permitting their customers to provide their own equipment. They reasoned that "divided ownership" of telephone equipment

is incompatible with "efficient service" and that it would lead to a lack of standardization of design, installation and maintenance and ultimately deterioration in service quality.[3]

Second, in addition to the prohibition of the *substitution* of customer provided equipment for any part of the telephone network, the companies' state and federal tariffs prohibited the interconnections or *attachments* of any devices *to* the carrier-provided telephone instruments. These tariff provisions applied equally to electrical interconnections, acoustical interconnections, and passive interconnections for decades.

Carterfone And Its Precursors. After World War II, the FCC recognized distinctions under the interstate tariffs between different types of attachments. In *Use of Recording Devices,* 11 F.C.C. 1033 (1947), the FCC permitted the attachment of customer-provided recording devices that were not available from telephone companies. However, the FCC explicitly required that any direct electrical interconnection be made only through "[a]dequate" carrier-provided "connecting arrangements" designed to protect against "impairments of telephone service [and] harmful voltages or currents." *Id.* at 1048-49. In *Hush-a-Phone Corp.,* 22 F.C.C. 112 (1957), the FCC authorized the non-electrical attachment to telephone handsets of a passive, plastic cup or any other such devices that could cause no systemic or public injury.

Finally, in *Carterfone,* 13 F.C.C.2d 420 (1968), the FCC adopted a new approach to foreign attachments. *Carterfone* involved a device that permits a telephone handset to be coupled with a handset from a private radio system so that voices from one system are picked up and transmitted over the other. Although this non-electrical, acoustical interconnection could have impaired telephone service if sound above certain decibel levels were introduced into the telephone network, the FCC found that the

[3] *Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.,* 70 P.U.R.3d 97, 101 (Minn. Dist. Ct. 1966); *Netsky* v. *Bell Tel. Co. of Pennsylvania,* 65 P.U.R.3d 145, 149 (Pa. Pub. Util. Comm'n 1966); *City of Los Angeles* v. *Southern California Telephone Co.,* 2 P.U.R. (n.s.) 247, 249 (Cal R.R. Comm'n 1933). See App. 192a (citing numerous other decisions).

Carterfone did not have a significantly greater capacity to cause adverse effects than did the human voice. *Id.* at 435. Because the tariffs prohibited the attachment of devices irrespective of whether they caused harm or impaired telephone service, the FCC invalidated the foreign attachment prohibition in its entirety. However, it specifically invited the telephone companies to "submit new tariffs which will protect the telephone network" against harmful attachments. *Id.* at 426.

Contrary to the Second Circuit's premise (p. 3, *supra*), the FCC's Opinion on Reconsideration in *Carterfone* did *not* establish that customers may provide their own telephone equipment; it established precisely the opposite. The FCC explicitly *rejected* the claim that *Carterfone* had " 'opened the door to customer ownership of telephone handsets,' " and emphasized that the case involved only *attachments* to the telephone network, not "the furnishing of purely telephone system equipment telephone-to-telephone on the message toll telephone system." 14 F.C.C.2d 571, 572 (1968); see App. 166a-167a.

The Post-Carterfone Tariffs. In 1967, quite apart from *Carterfone*, Bell formed a Tariff Review Group, which considered ways to modify its tariffs to open up the telephone network and to permit customer ownership of data processing systems not provided by Bell as well as PBXs and large key systems. See A3951-57. The Tariff Review Group recognized that any equipment connected to the network, no matter how well manufactured, could cause harm or impair the quality of service if improperly designed, installed, or maintained. The Tariff Review Group considered a number of mechanisms to protect the network. It rejected the option of undertaking to have Bell itself evaluate the design, installation, and maintenance of competitor's products, because that posed insuperable antitrust problems. A3958-78; see *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961). It also rejected an option of providing a PCA that would, through hardware, protect the network against every conceivable type of possible harm, including excessive decibel levels, because a PCA of that kind would have been overly expensive. A11998. Bell decided to protect against some potential

harms (*e.g.* acoustical ones) through standards, to protect against others through a simpler PCA, and to continue to provide all network control signalling functions through telephone company equipment.

In 1968, Bell filed "post-*Carterfone*" tariffs that permitted the unlimited acoustical and inductive interconnection of devices like the Carterfone, provided that they met certain standards for signal power. App. 164a. The tariffs further permitted telephone customers to, for the first time, provide their own PBXs, key telephone systems, and other telephone instruments, if they were connected to the network through a PCA that performed network control signalling functions. App. 165a. Because these tariffs applied to facilities used in common for intrastate as well as interstate service, they were filed with 48 States and the District of Columbia as well as with the FCC.

Before the FCC, a number of parties moved to reject the Bell tariffs on the ground that because they barred "customer-provided network control signalling units irrespective of whether they are harmful or harmless to the rest of the messsage toll telephone system," they violated the FCC's mandate in *Carterfone*. App. 166a. The Commission flatly rejected this argument. It reiterated that *Carterfone* had only involved *attachments* to the carrier-provided telephone system, and that the system *included* the telephone instruments that provide network control signalling. *Id.* It further reiterated that *Carterfone* "does not hold that a customer may substitute his own equipment or facilities" for any part of that network, "whether it be telephone instruments, loops, poles, or signalling equipment." *Id.* at 166a-167a. Thus, the FCC's opinions make it explicit that it was Bell which voluntarily allowed the competitive provision of PBXs and key systems, *not* the FCC. Between 1968 and 1975, the FCC explicitly reiterated its holding that the post-*Carterfone* tariffs complied with *Carterfone* and with existing federal regulations no fewer than *five* times.[4]

[4]App. 166a-167a; *AT&T "Foreign Attachment" Tariff Revisions*, 18 F.C.C.2d 871 (1969); App. 178a-179a; App. 182a; *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 221 (1974); *Mebane Home Telephone Co.*, 53 F.C.C.2d 473 (1975).

However, because the FCC did not wish to be foreclosed from ordering a different approach in the future, it did not specifically approve or prescribe the post-*Carterfone* tariffs. *Id.* at 167a.

Similar proceedings were conducted in many state commissions. Each initially allowed the tariffs to take effect in recognition that they did "little violence . . . to the traditional carrier responsibility for end-to-end telephone service." Comments of National Association of Regulatory Utility Commissioners ("NARUC") in FCC Docket 19528, p. 17 (Oct. 17, 1973). A number of state commissions held administrative hearings and explicitly upheld the PCA requirement. For example, the New York Public Service Commission held that the telephone company control over network signalling by means of the PCA was "absolutely necessary to ensure reliable service." *New York Tel. Co.*, 79 P.U.R. 3d 410, 417 (1969).

In response to manufacturers' arguments, the FCC thereafter instituted informal proceedings to consider whether it would be possible to develop technical standards under which customers could provide their own network control signalling units without impairing service. The FCC emphasized, however, that it ordered these proceedings solely because it "believed that if an acceptable standards program could be developed," it "would be in a better position to judge whether such a program [is] in the public interest." App. 177a.

The Commission's first step was to commission a study by the National Academy of Sciences ("NAS"). In June, 1970, the NAS study concluded that "uncontrolled interconnection to the common carrier network as it now exists would be harmful" and that the post-*Carterfone* tariffs of the carriers were a reasonable way to protect the network. A7214, 7221. It also found that the only alternative approach to the PCA would be a certification program in which the FCC would directly regulate the design, manufacture, installation, and maintenance of equipment. A7226-28. In March, 1971, and January, 1972, the FCC's Common Carrier Bureau established two advisory committees of industry participants to develop technical network protection standards for partic-

ular categories of equipment, including PBXs. At the same time, the Office of the Chief Engineer of the FCC, NARUC, and others were developing their own technical standards proposals.

II. The FCC's Rulemaking Proceedings.

In June, 1972, the FCC instituted a legislative rulemaking proceeding (Docket 19528). App. 176a-180a. It assumed that it would shortly have technical standards submitted from each of four groups then preparing them. *Id.* at 178a. It therefore instituted the proceeding to consider a different question: whether, as a matter of policy, it would be in the public interest to order a "basic and substantial change" in telephone service, and to *redefine* the franchised telephone monopolies to *exclude* integral parts of the telephone system and to permit customers to install their own network control signalling units. *Id.* at 176a. The FCC recognized that any such change would "as a practical matter" have to apply to "local exchange and intrastate service" regulated by state commissions because almost all signalling units are "used in common for both interstate and . . . intrastate communications." *Id.* at 178a. It thus took the extraordinary step of convening a Federal-State Joint Board to sit as an administrative law judge. *Id.*

The FCC reiterated that the post-*Carterfone* tariffs had already been held to comply with existing regulations (*Id.* at 178a-179a) and that the proceeding "raises no questions of lawfulness of any existing tariff." *AT&T, Revisions of Tariff FCC No. 260,* 41 F.C.C.2d 239, 240 (1973). Instead, the FCC stated the question was whether "to go *beyond what* [*it*] *ordered in Carterfone*" (App. 179a), and whether "telephone companies . . . should be required or *permitted* . . . to give customers additional options that they do not now have," (App. 182a) and that could "conflict with intrastate tariffs." *AT&T, Revisions of Tariff FCC No. 260, supra,* 41 F.C.C.2d at 240. After the submission of four proposals for technical certification standards, the FCC, in April, 1973, formally sought comments on each of these proposals and on the additional option that the existing tariffs "remain basically unchanged." App. 184a.

The Public Debate. This request for comments led to one of the most fundamental debates in the history of telecommunications. It ultimately produced dramatic changes in telephone service, whose ramifications are still being felt and publicly debated. See, *e.g.*, Saddler, *Future Rises In Phone Rates Are Attacked*, Wall St. J., June 22, 1983, at 29, col. 3 (describing effect of FCC policies and new legislative proposals to make basic telephone service more affordable).

The debate had at least four separate aspects. The first was the issue of harm to the network. What was the most cost-effective way to protect against particular harms? The second was the effect of certification on the quality of service and where best to draw the line between the regulated monopoly and the competitive aspects of telecommunications. Would division of responsibility over integral parts of the network create operational inefficiencies, impair the quality of existing service, and prevent or impede future innovations and improvements in service? The third set of issues—perhaps the most passionately contested—were social and economic. Would certification end or impair long-standing state regulatory policies of using above-cost rates from PBXs, key systems, and other business equipment to subsidize basic telephone service to make it more affordable for ordinary households?

The final, related issue was one of federalism. The States vehemently opposed certification and several States had, by that time, instituted proceedings to rescind Bell's post-*Carterfone* tariffs and to prohibit any customer ownership of telephone instruments, even when connected through PCAs, on the ground that even these tariffs could impair universal service. See *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974). Did the FCC have the power to preempt state regulation of facilities used to provide intrastate service? As a matter of federalism, should the FCC exercise this power and preempt the states' definitions of the franchised telephone monopolies?

In 1973, after much internal debate and discussion, Bell decided upon its response to the public debate. Like the state commis-

sions and NARUC, Bell opposed certification. However, Bell advocated the PCA requirement and disagreed with those States which sought to rescind the post-*Carterfone* tariffs, although it argued that state regulation should not be preempted. Bell stated the basis for its position in September 1973, in a public speech by its then chairman, John deButts. The Court of Appeals characterized this speech as the "coda marking Litton's demise as a competitor." App. 21a; see *id.* at 31a.[5]

The following month, in October, 1973, Bell filed 251 pages of comments in Docket 19528. A13170-13421. Bell's basic theme was that the regulatory policy of end-to-end responsibility had resulted in the best telecommunications system in the world and had made essential telephone service affordable for ordinary households. It argued that the division of responsibility that would result from certification could threaten vital national resources and have severe repercussions for local rates and the availability of telephone service to the average consumer. See App. 136a-140a.

First, although it had no scientific proof of harm to the network, Bell stated that the National Academy of Science's study had demonstrated the risk of "specific harms" to the network. App. 142a. Second, Bell's Comments stated that "specific harms" are only a limited aspect of the problem, because "overall quality of service is a vital concern." *Id.* Although it cautioned that "complete and exhaustive statistics" might never be obtainable, Bell's comments stated that the impact of interconnection on the "quality of service" is "real or actual," not merely "potential." It reported that its studies (the "Hunt studies") showed trouble reports 25 to 50 percent higher for lines that had customer provided equipment and that 8.5 percent of customers using their own data systems were found to be applying excessive signal

[5]Judge Charles Richey, in contrast, has found that the speech "shows a genuine concern on the part of Mr. deButts for the protection of the telecommunications system for *all*" and that "the theme was not one of anticompetition, but rather, one of *pro* consumer." *Southern Pacific Com. Co.* v. *AT&T*, 556 F.Supp. 825, 902 n.74, 903 (D.D.C. 1983) (emphasis in original).

power. App. 143a-144a. It stated that the data "are sufficiently consequential" to suggest that interconnection "had already had an adverse impact on the quality of service" and that further liberalization was inappropriate. *Id.* Bell further argued that customer provision of signalling equipment would cause operational inefficiencies, because carriers would not control all network facilities and would be impeded in responding to trouble reports. A13216-29. In addition, Bell made detailed showings that elimination of carrier control over signalling units would impair innovation because all the major advances in telephony had required *parallel* modifications in central switching systems and signalling units. A13210-14, 13324-51.

Bell also evaluated the four certification proposals then before the FCC and concluded that, under the standards of the National Academy of Science's report, each was inadequate because it failed to take sufficient steps to protect against improper installation or maintenance of customer provided equipment and that each would be more costly than the PCA and less cost-effective. A13255-84. Finally, it urged that the PCA approach was preferable because it imposed the costs on the large businesses which benefitted from competition and would not impair the regulatory practice of pricing business equipment to subsidize residential rates. A13230-36; 13198-202. NARUC, numerous state commissions, and independent telephone companies made parallel arguments.

The FCC's Decisions. In 1974, the FCC decided it could and would preempt state regulation of customer premises equipment. *Telerent Leasing Corp., supra.* Its authority to do so was upheld by a 2 to 1 decision in *North Carolina Utilities Comm'n.* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert denied*, 429 U.S. 1027 (1976).

In 1975, the FCC decided to adopt a certification program for data systems and other ancillary equipment. PBXs and key telephone systems, however, were excluded from the program pending additional consideration by the Federal-State Joint Board. *First Report and Order*, 56 F.C.C.2d 593 (1975). In 1976, the Board concluded that certification of PBXs and key systems at that time would be "adverse to the public interest," expressing

concern about the economic and social effects (which were being considered in Docket 20003, a separate fact finding inquiry) as well as technical harms. Later that year, after first concluding that no showing of any actual economic harm had been made to date in Docket 20003,[6] the FCC reversed the Joint Board and, over the dissents of Commissioners Benjamin Hooks and James Quello, ordered that PBXs and key systems be included in the program. *Second Report And Order*, 58 F.C.C.2d 736, 740 (1976). However, in recognition of the special technical problems presented by this equipment, the FCC ordered that PCAs be engineered into any certified equipment. In 1978, the FCC eliminated the PCA requirement for registered PBXs and key systems. *Third Report And Order*, 67 F.C.C.2d 1255 (1978). The FCC's decisions rejected the National Academy of Science's conclusion that there had to be direct regulation of installation and maintenance. The FCC's technical standards occupy 132 pages in the Code of Federal Regulations. See 47 C.F.R. §§ 68.1-68.506 (1982).

Contrary to the Second Circuit's premise (p. 3, *supra*), the FCC did not hold that the PCA requirement had been "unreasonable" at any prior time. On the contrary, in the absence of a system of certification, the PCA had been necessary. The FCC adopted regulations that to this day *prescribe* the use of PCAs with any unregistered equipment, see 47 C.F.R. §68.102; App. 190a, reasoning that the "likelihood of harm" was "sufficiently high," *irrespective* of whether the specific equipment had been shown to be harmful. *Third Report And Order, supra*, 67 F.C.C.2d at 1272 & n.21. The FCC found that the PCA requirement became "unreasonable" within the meaning of the Com-

[6]The FCC had stated to Congress that it was "essential" that these economic factors be examined before a decision was reached on PBX certification. See Statement of Richard E. Wiley, Chairman of FCC, Before The Subcommittee On Communications of The Senate Committee On Commerce, 94th Cong., 1st Sess. p. 63 (April 21, 1975). In September, 1976, the FCC issued its Docket 20003 report that rejected the economic objections to certification. *Economic Implications And Interrelationships Arising From Policies And Practices Relating To Customer Interconnection, Jurisdictional Separations, And Rate Structure*, 61 F.C.C.2d 766 (1976).

munications Act when, and only when, the FCC had both adopted technical standards defining "benign connections" and determined that particular equipment complied with those standards. *Id.*[7]

III. The Present Case.

Litton entered the market for PBXs and key telephone systems in 1971, after the PCA requirement had been in effect for several years. Initially, Litton was very successful. In early 1974, following the indictment of four of its top telephone equipment executives for commercial bribery, Litton decided to leave the market. It filed this action in June, 1976, seeking to recover its losses and alleged lost profits as a competitor through 1990 of $570,082,000, and also to recover the tariffed charges it paid for PCAs as a user of customer provided equipment from 1969 through 1979 of $491,778.

The Trial Court Proceedings. Litton's trial presentation focused on two sets of allegations. First, Litton challenged Bell's pricing of its PBXs and key systems as predatory. Second, Litton challenged Bell's PCA requirement on two grounds. Its principal claim was that Bell's 1973 opposition to certification had violated the Sherman Act. Although its business plan had assumed that the PCA would remain in effect until 1973, Litton also claimed that the initial filing of the post-*Carterfone* tariffs in 1968 had violated the Sherman Act because Bell's tariffs had failed to establish the kind of certification program that the FCC adopted in 1978, ten years later.

Bell argued that neither of Litton's PCA charges provided any basis for antitrust liability. First, it contended that its opposition to certification was protected under the *Noerr-Pennington* doctrine. It asserted this claim by seeking partial summary judgment, by moving for a directed verdict at the close of plaintiffs' case, and by moving to exclude the evidence of the deButts's

[7]The FCC's statutory findings of "unreasonableness" are "rhetoric" that must be invoked before the FCC can order new practices. *MCI Telecommunications Corp.* v. *FCC*, 627 F.2d 322, 336–38 (D.C.Cir. 1980).

speech and of its pleadings before the FCC. A732-39, 3947-49; R.60, 64. The District Court denied these motions, reasoning that Litton had alleged that Bell's use of the Hunt studies had been "false" or "misleading" and therefore a "sham." App. 97a, 121a-123a. However, the District Court recognized that its interpretation of the sham exception to *Noerr-Pennington* was "not exactly the same as the sham exceptions that have previously been recognized by the courts" and that it "was sticking [its] neck out." A2033, A16471-72.

After excluding the New York Public Service Commission's finding that the PCA was "absolutely necessary," the trial court submitted the issue whether Bell had opposed certification in bad faith to the jury. The trial court refused Bell's proposed instruction that tracked the language in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-70 (1965), and stated that advocacy is protected even if Bell's intent had been anticompetitive. App. 145a-147a. Instead, over Bell's objection, the court instructed the jury that Bell's opposition would be unprotected if it was found, by a preponderance of the evidence, to have been "interposed in bad faith for the purposes of excluding competition." The instructions went on to state that administrative proceedings take time and that creating delays does not violate the Sherman Act as long as the "petition" is "based on a good faith interest in influencing the agency." Finally, the instructions stated that there is a "sham exception" to these principles where "misrepresentations" are made to agencies. App. 153a-156a.

Second, Bell contended that there was no basis for Litton's separate charge that the filing of the post-*Carterfone* tariffs violated the Sherman Act. Although Bell's conduct had been held not to be absolutely immune from antitrust liability, App. 98a-121a, Bell argued that reasonable attempts to comply with state and federal regulatory policy do not violate the antitrust laws and that the tariffs at issue not only were a reasonable effort, but were repeatedly held to have *gone beyond* the then existing regulations by permitting customers to provide their own tele-

phone instruments.[8] The District Court denied Bell's motion for a directed verdict (A6029), refused to instruct the jury under this standard (App. 147a-149a), and instead, over Bell's objection (App. 151a), told the jury that the tariff filing must be found to violate the antitrust laws if Bell "knew or should have known at the time" that "the establishment of standards was a practical method" of protecting the network. App. 153a.[9] Bell also contended that, in any event, Litton's claim as a customer was barred by the filed tariff doctrine of *Keogh* v. *Chicago & Northwestern R.Co.*, 260 U.S. 156 (1922), but the District Court refused to dismiss this claim (A6029).

The Verdict. The jury found for Litton on the charge of "opposing certification in bad faith" and on two other charges.[10] It found against Litton on four charges, including the pricing charge and the charge that Bell was guilty of "intentionally providing unduly expensive, inefficient, or unreliable devices." The jury reported it was divided on two charges, including the charge that Bell initially filed the interface device tariff in bad faith. The jury found Litton had been damaged as a competitor in the amount of

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[8]Bell also contended that the filing of the tariff was the first step in its successful efforts to persuade the FCC and the States to permit the PCA tariff to take effect, to hold that the PCA complied with existing policy, and ultimately to prescribe the PCA for all unregistered equipment. The District Court's instructions stated that the *Noerr-Pennington* doctrine applied to the tariff filing. App. 156a.

[9]The District Court also gave a general instruction on the effect of regulation that stated, over Bell's objection, that state regulatory commissions had had no authority to restrict use of telephone instruments and that regulation was but "one factor" that could be considered in assessing Bell's conduct. App. 152a.

[10]These were: "intentional delay in providing and installing interface devices," and "bad faith refusal to sell inside wiring at all or on a reasonable basis." Although initially divided, the jury subsequently also found Bell guilty of "bad faith delay in making cutovers." Because each of these three charges could only have affected individual customer transactions, none of them could support the entire judgment. Moreover, Litton did not produce any evidence that any of these practices cost it a single customer. If the judgment is reversed, one issue on remand will be whether Litton is entitled to a new trial on these charges.

$91,990,000 and had been damaged as a customer in the amount of $268,243. App. 156a-160a.

The damages award was keyed to the period in which Bell opposed certification. The award of $91,990,000 is, to the dollar, the sum of all Litton's actual losses plus all its alleged lost profits from 1973 through 1978, the year certification was adopted for PBXs and key systems. Although Litton sought to recover PCA charges it paid as a customer over the entire eleven year period from 1969 through 1979, the jury awarded, to the dollar, six-elevenths of the amount claimed, obviously awarding damages for the six year period from 1973 through 1978.

After receiving the verdict, the trial court, at 5:18 p.m., sent the jury back to try to reach agreement on the issues on which it was divided. Twenty two minutes later, the jury resolved both remaining charges against Bell. The damages award was not changed.

Second Circuit's Decision. On appeal, Bell reiterated each of its arguments relating to opposition to certification and its advocacy of the PCA requirement. The Second Circuit, however, did not engage in an independent assessment of any aspect of Bell's opposition to certification or determine itself whether it was reasonable and constitutionally protected activity. Instead, it set forth two "versions" of the facts. The first was the Bell "version," which recounted some of the regulatory history, the FCC holdings that the 1968 tariffs complied with *Carterfone* and with all existing regulations, and the opposition to certification by the States, independent telephone companies, two FCC Commissioners, and the Federal-State Joint Board. App.16a-24a. The second was the "Litton version" which rested on the premise (which has been shown to be false) that *Carterfone* and *Hush-a-Phone* somehow decided the certification issue, which emphasized the lack of empirical proof of harm, and which further drew numerous inferences from Bell's internal memoranda, including Bell memoranda that had discussed proposals for a *different* type of PCA that was *not* adopted in the filed tariffs. App. 24a-33a.

The Court of Appeals recognized that the jury finding on the initial filing of the post-*Carterfone* tariffs in 1968 was made after

the jury "render[ed] the main verdict on liability and damages," that it did not affect the award, and that Litton had assumed that the PCA would remain in effect until 1973. App. 33a-34a, 78a. Nevertheless, the court analyzed the belated finding on the filing of the PCA tariff as well as the separate finding that Bell's opposition to certification had violated the antitrust laws.

First, it held that the *Noerr-Pennington* doctrine was inapplicable to the case. The court rejected the argument (p. 16n.8, *supra*) that the tariff filing was protected by *Noerr-Pennington*, App. 42a-47a, and further held that it had been properly found to violate the antitrust laws because it violated the "mandate in *Carterfone*." App. 51a. It did not address Bell's argument that the instruction on this issue was erroneous. The court further held, by a vote of 2 to 1, that *Noerr-Pennington* was also inapplicable to Bell's opposition to certification because its opposition had the effect of maintaining the PCA requirement as the only alternative to certification. App. 47a.

Alternatively, an undivided court held that both the filing of the PCA tariff and the opposition to certification were "baseless" and a "sham." Each of the alternative holdings relied on the fact that Litton's "version" of the fact would support "inferences" that Bell's opposition "embraced much more than merely advocating a position," that it was "baseless" because it violated the "mandate in *Carterfone*," that Bell "affirmately misled" the FCC, and that Bell's subjective intent had not been to influence government action, but to delay it. App. 47a-54a.

The Court of Appeals further held that some of the District Court's evidentiary rulings, App. 69a-71a, including exclusion of the New York commission finding that the PCA was "absolutely necessary," were erroneous, but not reversible error. It criticized the *Noerr-Pennington* instructions, but held that they were sufficient. App. 54a-58a. The court further held that it would follow an earlier panel decision that customer claims are not barred

by the filed tariff doctrine "unless otherwise advised by higher authority" and that this decision established that Litton could recover the PCA charges it paid because, under the Second Circuit's view, the FCC had held that the post-*Carterfone* tariffs had been invalid when filed. App. 73a-74a.

Finally, the court rejected Bell's argument that the damages award included losses and lost profits caused by price reductions that the jury had found to be lawful. App. 84a-85a. It held that Litton's damages evidence did not assume that Bell's price reductions were unlawful, despite the fact that Litton's damages witness testified that he could not disaggregate the effects of the price reductions (App. 84a) and that the whole theory of Litton's case was that its demise had been caused by the *combination* of the PCA and the price reductions. A6188, 6195 (closing argument).

REASONS FOR GRANTING THE WRIT

The Second Circuit held that a party may be penalized with treble damages liability of $276 million for participating in a public debate on an issue of fundamental public importance and for advocating a reasonable position that comported with traditional public interest concerns as well as the positions of numerous disinterested representatives of the public interest. This holding "strikes at the very center of the constitutionally protected area of free expression," *New York Times* v. *Sullivan*, 376 U.S. 254, 292 (1965), and will inevitably inhibit constitutionally valuable speech. The Second Circuit's decision flatly conflicts with the legal standards applied by numerous other Courts of Appeals and with Judge Harold Greene's holding on the same evidence in a parallel Government antitrust action. It presents questions raised in no fewer than 17 pending cases.

I. The Second Circuit's Decision That Opposition To Certification Is Not Protected Activity Conflicts With The Decisions Of This Court And Of Other Courts Of Appeals.

The "very foundation of constitutional government" lies in freedom to petition governmental officials, to participate in legislative proceedings, and to state opinions on matters of public im-

portance—all "to the end that government may be responsive to the will of the people." *DeJonge* v. *Oregon*, 299 U.S. 353, 365 (1937). This Court's decisions have sought to assure that the application of federal or state statutes will not prevent or inhibit persons from engaging in this constitutionally valuable activity and providing "the information upon which governments must act." *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961); *First National Bank* v. *Bellotti*, 435 U.S. 765, 791-92 & n.31 (1978).

The Noerr-Pennington Doctrine. In *Noerr*, this Court held that the Sherman Act could not be applied to a railroad's campaign to "destroy truckers as competitors" by influencing state and federal officials to pass and enforce laws. 365 U.S. at 145. *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), expanded *Noerr*, holding that efforts to influence executive officials cannot be held to violate the Sherman Act, even if accompanied by an anticompetitive intent that would otherwise violate that statute. In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), this Court made it explicit that the *Noerr-Pennington* doctrine rests on the First Amendment and is fully applicable to advocacy before administrative agencies. The First Amendment has accordingly been consistently held to protect efforts to litigate claims of public importance. See, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963).[11]

Bell's opposition to certification is unquestionably activity that is protected by the *Noerr-Pennington* doctrine and the First Amendment.[12] The Second Circuit's contrary holding largely rests on its acceptance of Litton's claim that the doctrine only applies to attempts to obtain affirmative government action that would injure a competitor (as in *Noerr* and in *Pennington*), but

[11]In *Bill Johnson's Restaurants Inc.* v. *NLRB*, U.S. , 51 U.S.L.W. 4636 (May 31, 1983), the importance of petitioning activity led this Court to hold that the NLRB may not enjoin nonfrivolous litigation that raises *no* issues of public importance and that was filed to retaliate against employees for exercising their organization rights.

[12]The belated finding on the initial filing of the tariff is irrelevant to the judgment, and, in any event, is unsupportable (see p. 27-28, *infra*).

does not apply to advocacy that opposes the entry of new competitors into a market and that maintains an allegedly anticompetitive state of affairs or carrier practice (such as the PCA requirement). App. 42a, 47a. There is no support for such an unworkable distinction. Both kinds of advocacy can and do address fundamental public interest concerns. *California Motor Transport* and numerous court of appeals cases have held that the First Amendment is fully applicable to advocacy in opposition to liberalized entry. For example, in *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980), Southwestern Bell had denied interconnections needed to enter the local exchange business on public interest grounds. Its subsequent opposition before the FCC to a petition for an interconnection order was held to be absolutely protected by the First Amendment and the possibility that a jury had relied on this conduct required reversal of the judgment.[13] *Id.*, at 1384.

The Sham Exception. Because the initiation of proceedings can be a powerful weapon to injure competitors, see R. Bork, The Antitrust Paradox 357 (1978), there is a "sham" exception to these principles. However, it has been narrowly construed to assure that constitutionally valuable activity is not inhibited. The exception was inapplicable in *Noerr*, despite the fact that the railroad's campaign had been found to have "deliberately deceived the public and public officials" and to have been "reprehensible." 365 U.S. at 145. In *California Motor Transport*, the Court applied it against a truckers' association only because it had filed

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[13] *Accord, Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 663 F.2d 253, 257 (D.C. Cir. 1981) (protecting opposition to new entry of mail order houses); *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Exec. Bd.*, 542 F.2d 1076, 1081 (9th Cir. 1976) (protecting opposition to license application); *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975) (protecting opposition to award of new cable television franchises); *Mark Aero, Inc.* v. *TWA*, 580 F.2d 288 (8th Cir. 1978) (protecting opposition to attempts to reopen an airport).

The Second Circuit's other reasons for holding opposition to certification unprotected rest on the same facts that led it to characterize Bell's opposition as a sham. App. 48a n.35. They are discussed below.

protests against each and every license application of competitors even "*without* probable cause" and thereby effectively barred competitors from access to the agency that could authorize their entry. 404 U.S. at 512. The Court stated that different standards applied to adjudicatory than to legislative proceedings, but carefully limited the sham exception to similar conduct which "may corrupt administrative or judicial processes," such as bribery. *Id.*, at 513.

The ultimate test of whether conduct may be penalized as a sham is whether it, "like intentional falsehoods or knowingly frivolous claims," consists of activities that can be penalized without inhibiting debate of public affairs. *Bill Johnson's Restaurants Inc.* v. *NLRB, supra,* 51 U.S.L.W. at 4639, *quoting* Balmer, Sham Litigation and The Antitrust Laws, 29 Buff. L. Rev. 39, 60 (1981). It requires a sensitive judicial assessment of the statements to determine "whether they are of a character which the principles of the First Amendment protect." *Pennekamp* v. *Florida,* 328 U.S. 331, 335 (1946).[14] Numerous courts of appeals have thus held that conduct cannot be a sham unless it is overtly corrupt and not merely normal and legitimate advocacy or its incidents.[15]

The conflict between the Second Circuit's holding and these principles is most vividly demonstrated by Judge Harold Greene's decision in *United States* v. *AT&T,* 524 F.Supp. 1336 (D.D.C.

[14]The judicial assessment is normally an independent examination of the record to ensure that the governing standards have been properly applied. See *New York Times* v. *Sullivan, supra,* 376 U.S. at 385-92; *Connick* v. *Myers,* U.S. , 51 U.S.L.W. 4436, 4439 (April 20, 1983); *Bose Corp.* v. *Consumers Union,* 692 F.2d 189, 195 (1st Cir. 1982), *cert. granted,* 51 U.S.L.W. 3774 (April 25, 1983). At a minimum, the reviewing court must assess the speech to assure that it is of a character that can be permissibly condemned. See *Jenkins* v. *Georgia,* 418 U.S. 153 (1974). The Second Circuit did neither.

[15]*Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n, supra,* 663 F.2d at 263; *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Exec. Bd., supra,* 542 F.2d at 1080; *Semke* v. *Enid Automobile Dealers Assn.,* 456 F.2d 1361, 1366 (10th Cir. 1972); *Mid-Texas Communications Systems* v. *AT&T, supra,* 615 F.2d at 1384.

1981), which is a parallel Government antitrust action in which the same evidence of opposition to certification was presented during the Government's case-in-chief. There, although refusing to dismiss most of the Government's other claims if they had a conceivable basis, Judge Greene held that "of course, evidence of AT&T's position before the FCC in its certification docket No. 19528 does fall within the [*Noerr-Pennington*] doctrine," is not a sham, and cannot be a basis of antitrust liability. *Id.*, at 1363 n. 110, 1361-64.

Other considerations make the conflict even clearer. First, there is no basis for even applying the sham exception. It was the FCC that initiated the rulemaking proceeding, *not* Bell. Bell was responding to an ongoing debate by advocating a proposal that the FCC had *stated* it was considering and had invited comment: maintenance of the PCA status quo. The reasons for the sham exception—the fear that the initiation of lawsuits or filing of protests to license applications can be an instrument to harass competitors—are simply inapplicable. Speech at the invitation of government cannot be penalized. See *Cox* v. *Louisiana*, 379 U.S. 559, 568-71 (1965). This is particularly so because John deButt's public speech and Bell's pleadings stated opinions on issues of transcendant "public concern," such as the most cost-effective way to protect a vital national resource and the effect of certification on the quality of essential service, future innovation, and residential rates. See *Connick* v. *Myers, supra*, 51 U.S.L.W. at 4438; *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 40-43 (1971) (Opinion of Brennan, J.).

More fundamentally, Bell's advocacy unquestionably had a reasonable basis. Identical public interest concerns led two FCC Commissioners, the Federal-State Joint Board that sat as an administrative law judge, numerous state commissions, their national association, and independent telephone companies to oppose certification of PBXs and key systems. These facts conclusively demonstrate that Bell's conduct may not be found to be a sham.

The District Court's and the Second Circuit's conclusions that Bell could be found to have "affirmatively misled" the FCC, to

have made "baseless" or "unsupportable" claims of harm and to therefore be guilty of sham conduct (see App. 48a, 51a-53a) rests on Bell's disclosure of the Hunt studies and its reliance upon them. See pp. 11-12, *supra.* But this was valuable speech, and it cannot be penalized. The Hunt studies were *true;* there *were* higher trouble reports and violations of signal power standards on lines with customer provided equipment. Although their author and others recognized that these studies were not scientific proof of *"specific harms"* to the network, the studies were assuredly "sufficiently consequential" to be circumstantial evidence that, as Bell contended, even interconnection under the post-*Carterfone* tariffs had had an adverse effect on *service quality.* See pp. 11-12, *supra.* The District Court's and the Second Circuit's holding that it is permissible for juries to condemn such statements of opinions as "misleading" or "false" cannot be squared with the First Amendment, see *Gertz* v. *Welch,* 418 U.S. 323, 339-40 (1974), and would inevitably penalize and deter valuable speech.

Other courts of appeals have flatly rejected the Second Circuit's position, holding that statements of opinion made to influence policymaking (*e.g.,* on "health concerns") are absolutely protected even if "not satisfactorily supported at trial." *Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n, supra,* 663 F.2d at 257; see *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971) (denying protection only because false forecasts were ministerial filings unrelated to policy arguments). Other courts of appeals have even held that factually false statements must be protected where, as here, they are made in legislative proceedings before an agency. *Mark Aero, Inc.* v. *Trans World Airlines, Inc., supra,* 580 F.2d at 297 (8th Cir. 1978); *Metro Cable Co.* v. *CATV of Rockford, Inc., supra.*

The Second Circuit's fundamental error was its failure to assess Bell's conduct itself and hold that the incidents of legitimate advocacy cannot be the basis for imposing antitrust liability. Instead, it upheld the judgment on the ground that there was a "Litton version" of the facts under which a jury could transmute

Bell's responsible and constitutionally valuable advocacy into a sham. For example, the Second Circuit's summary of the "AT&T version" of the facts *quotes* the FCC's holding that *Carterfone* did not authorize customers to substitute their own telephone instruments and that the post-*Carterfone* tariffs complied with *Carterfone*—which was reiterated five times between 1968 and 1975. App. 17a. Nevertheless, the Second Circuit holds that the jury could permissibly adopt a Litton version of the history in which both the tariffs and Bell's opposition to certification violated the "mandate in *Carterfone*" and were therefore "baseless." App. 51a. This holding not only violates the principle that the meaning of regulatory decisions is a question of law for the court and cannot be submitted to a jury, see, *e.g.*, *Trust of Bingham* v. *Comm'r*, 325 U.S. 365, 370-71 (1945); *Marshall* v. *Isthmian Lines, Inc.*, 334 F.2d 131, 137-38 (5th Cir. 1964), but, by permitting juries to convert reasonable speech into a sham by engaging in such historical revisionism, violates the First Amendment.

Similarly, the Second Circuit held that the jury could infer that claims of harm made by the National Academy of Sciences, state commissions, and Bell and ultimately *accepted* by the FCC itself,[16] were "baseless" because there were internal Bell memoranda commenting on the absence of direct evidence of harm (which was only one of *four* issues raised, see pp. 9-12, *supra*) and indicating that some employees did not favor retention of the PCA and believed that Bell might not succeed. App. 25a-26a, 28a-29a, 52a. But such internal memoranda evaluating evidence and intracorporate debate will accompany *any* legitimate exercises of First Amendment rights, and such evidence cannot permissibly be used to penalize constitutionally protected speech. Such intracorporate debate should be *encouraged*, not inhibited.

Finally, the Second Circuit permitted Bell's speech to be condemned by extrapolating from internal Bell documents that are

[16]The FCC adopted its certification regulations to protect the network against precisely these risks of harm that the NAS and Bell identified. The FCC disagreed with Bell and the NAS only on matters of opinion: the overall effect of increased competition and the cost-effectiveness of different network protection mechanisms.

wholly irrelevant to Bell's defense of the PCA requirements and its opposition to certification. For example, the Court of Appeals relies extensively on internal memoranda stating that a proposal for a *different* type of PCA—which was rejected by Bell and *not* embodied in the post-*Carterfone* tariffs—was "redundant, uneconomic, and unnecessary" and that an earlier draft tariff, which was *not* filed, violated *Carterfone.*[17] App. 27a & n.15; 28a & n.16; 51a-53a. To uphold the verdict on the basis of this evidence was particularly improper because the jury here found that the PCA required by the post-*Carterfone* tariffs was not "unduly expensive, inefficient, or unreliable." See p. 16, *supra.*

Under the Second Circuit's approach, no advocacy, no matter how reasonable and legitimate at the time, can be immune from post-hoc condemnation through extrapolation from irrelevant conduct or outright revisionism of history. The fact that the Second Circuit's holding refers primarily to John deButt's public speech before NARUC to support the judgment, App. 21a, 31a—which was a classic and responsible exercise of freedom of speech, see p. 11, *supra*—vividly demonstrates the potential for interference with First Amendment values.

In any event, Bell's speeches and pleadings had a number of discrete aspects. Yet the Second Circuit held that no attempt need be made to determine whether the delays in certification had been caused by aspects that were unquestionably constitutionally protected, such as the advocacy of economic issues by the States

[17]Similarly, the Second Circuit stated that the jury could infer that Bell sought to delay certification because it failed to withdraw from the PBX Advisory Committee after Bell decided to oppose certification in March, 1973. App. 52a-53a. But that conduct, too, is irrelevant because it occurred *after* the PBX Advisory Committee issued its "final report" in August, 1972 (see App. 19a, 20a) and at a time when the public was preparing comments on the report. The Court of Appeals also refers to the even more irrelevant fact that Bell, which undisputably made the single greatest contribution to that committee's work, A4223, A4253-54, had been late with some "homework assignments" after completion of the final report, after the rulemaking proceeding began and at a time when the FCC indisputably had the information necessary to rule on certification, and *before* the FCC even undertook to address the critical social and economic issues. See pp. 8-9, 13 n.6, *supra.*

as well as Bell. Compare *Mt. Healthy City Bd. of Ed* v. *Doyle*, 429 U.S. 274, 285-86 (1977) *with* App. 78a n.49. This constitutional error is an egregious one because it was the economic issues that delayed certification until long after Litton had left the relevant markets. See p. 13 n.6, *supra*.

A holding that Bell's opposition to certification cannot be held to violate the antitrust laws as a matter of law will require reversal of the entire judgment on liability as well as damages (see *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931)) and resolve the fundamental questions presented. However, there are other issues that are logically part of any review of this case, especially because they are based on the same false premise that infected the Second Circuit's decision on the main issue. See pp. 3-9, *supra*. The first is the question whether, if there is a jury question under *Noerr-Pennington* (contrary to Bell's claim), the jury instructions may make the threshold question of the protected character of opposition to certification depend on a finding by the preponderance of the evidence that Bell's "purpose was to exclude competition."[18]

The second is the lower court's refusal to follow decisions of other courts of appeals[19] and hold that conduct cannot be held to violate the antitrust law if it was a reasonable attempt to comply with the then existing state and federal regulatory requirements.

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[18]Such an instruction was the very basis for the reversal of the judgment in *United Mine Workers* v. *Pennington, supra*, 381 U.S. at 669-70. Contrary to the Court of Appeals' reasoning, the District Court's later sham instruction, which itself did not explicitly refer to *purpose*, was inadequate to cure the defect. App. 56a-57a. Under the instructions as given, the jury would never have reached the sham exception if it found that the advocacy's purpose had been to exclude competition and that Bell's advocacy was therefore unprotected in the first instance. The refusal to give a "clear and convincing" evidence instruction was an error that further increased the risk of punishment of protected speech.

[19]*Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 737-43 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 785 (1983); *Mid-Texas Communications Systems, Inc.* v. *AT&T, supra*, 615 F.2d at 1380-81. See generally *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 360-61 (1963) (regulated firms must be given "sufficient breathing space" to carry out regulatory responsibilities).

Under this standard, Bell's post-*Carterfone* tariffs could not be found to have been filed in bad faith or to have been antitrust violations because the FCC then *held* that customers had no right to substitute Litton's PBXs or key systems for Bell equipment and that Bell's tariffs went *beyond* any existing regulatory requirements. See p. 7, *supra*. The court should have directed a verdict or at least instructed the jury under the correct standard. The third is the decision that customers can bring treble damages actions to recover tariffed charges. This holding is inconsistent with the filed tariff doctrine of *Keogh* v. *Chicago & Northwestern R.R.*, 260 U.S. 156 (1922), and its numerous progeny, and conflicts with *McLeran* v. *El Paso Natural Gas*, 491 F.2d 1405 (5th Cir. 1974), *aff'g*, 357 F.Supp. 329, 331-32 (S.D. Tex. 1972), and with *Essential Communications Systems* v. *AT&T*, 610 F.2d 1114, 1121-22, 1124 (3d Cir. 1979).

II. The Questions Presented Have Enormous National Importance.

Because the questions presented are fundamental to our form of government, they would possess great national importance even if the sole effect of the Second Circuit decision were to inhibit constitutionally valuable activity in all rulemaking proceedings. For that reason alone, certiorari should be granted.

Moreover, the precise question whether Bell's advocacy of the PCA and its opposition to certification is protected conduct has been raised in no fewer than 17 pending private treble damages cases.[20] The Second Circuit's decision has itself spawned litiga-

[20]*General Dynamics Corp.*, v. *AT&T*, No. 82-C-7941 (N.D.Ill.); *Glictronix Corp.* v. *AT&T*, No. 82-4447 (D.N.J.); *Gregg Communication Systems* v. *AT&T*, No. 82-C-6291 (N.D. Ill); *Jack Faucett Assoc., Inc.* v. *AT&T*, No. 81-1804 (D.D.C., 1981) (and four consolidated cases); *KWF Industries, Inc* v. *AT&T*, No. 83-0431 (D.D.C.); *Phonetele, Inc.* v. *AT&T*, No. 74-3566-FW (C.D.Cal.); *Rice International Corp.* v. *AT&T*, No. 82-2573 (S.D.Fla.); *Selectron, Inc.* v. *Pacific Northwest Bell Telephone Co., et al.*, No. 76-965-BE (D.C.Ore.); *Sound, Inc.*, v. *AT&T*, No. 76-182-2 (S.D.Iowa) (and one consolidated case); *DASA Corp.* v. *AT&T*, No. 83-2695 (E.D.Pa.); *Amtel Communications, Inc.* v. *AT&T*, No. 82-8754 (S.D.N.Y.); *Telephonic Equipment Corp.* v. *AT&T*, No. 82-C-8478 (S.D.N.Y.).

tion. Despite the fact that the Second Circuit's decision may not be given "offensive" collateral estoppel effect under the principles of *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), plaintiffs in several of the pending private cases have already moved for partial summary judgment on the ground that the Second Circuit decision should be treated as collateral estoppel. By granting certiorari and reversing the Second Circuit, this Court can eliminate the litigation and subsequent appeals on collateral estoppel, simplify and provide lawful standards for 17 pending cases, as well as resolve issues fundamental to democratic government.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and the case set for oral argument.

Alternatively, the petition should be granted, the judgment below should be summarily vacated on the ground that it rests on a false premise of regulatory fact (see pp. 3-9, *supra*), and the case remanded to the Court of Appeals for reconsideration in light of the fact that the 1968 tariffs were not in violation of *Carterfone*, as the FCC held in passing on that tariff and in four subsequent opinions. Where a constitutional decision rests on such a false premise, this Court may reverse on that ground and thereby avoid the constitutional question. See, *e.g.*, *Neese* v. *Southern Railway Co.*, 350 U.S. 77 (1955); *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942).

Respectfully submitted,

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Of Counsel

June 28, 1983

*Counsel of Record

No. 82-

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

vs.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

Opinion of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1323-26, 1344—August Term, 1981

(Argued June 14, 1982 Decided February 3, 1983)

Docket Nos. 81-7598, 7766, 7776, 7778, 7856

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Plaintiffs-Appellees-Cross Appellants,

—v.—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Defendants-Appellants-Cross Appellees.

LITTON SYSTEMS, INC.,

—v.—

SOUTHWESTERN BELL TELEPHONE COMPANY,

Defendant-Appellee.

Before:

OAKES, MESKILL and KEARSE,

Circuit Judges.

Appeal from jury verdict in an antitrust action in the United States District Court for the Southern District of New York, William C. Conner, *Judge*, finding defendant liable for willful maintenance of monopoly power and attempted monopolization and awarding plaintiff damages in its capacity as competitor and customer of defendant. Affirmed.

HOWARD J. TRIENENS, New York, NY (Jim G. Kilpatric, William J. Jones, David J. Ritchie, New York, NY; Leonard Joseph, Harvey Kurzweil, Joseph Angland, Fred R. Biesecker, Dewey, Ballantine, Bushby, Palmer & Wood, New York, N.Y.; Frank C. Cheston, Henry T. Brendzel, of counsel), *for Defendants-Appellants-Cross-Appellees.*

WILLIAM SIMON, Howrey & Simon, Washington, DC (Theodore F. Craver, Larry L. Yetter, Litton Industries, Inc., Beverly Hills, CA; Peter E. Fleming, Jr., Curtis, Mallet-Prevost, Colt & Mosle, New York, N.Y.; John Bodner, Jr., Francis A. O'Brien, John W. Nields, Jr., Ralph Gordon, Albert O. Cornelison, Jr., Kevin P. McEnery, Lewis M. Barr, Lisa A. Gok, Howrey & Simon, Washington, DC) *for Plaintiffs-Appellees-Cross Appellants.*

OAKES, *Circuit Judge:*

This appeal is taken from jury awards exceeding ninety million dollars before trebling entered by the United States District Court for the Southern District of New York, William C. Conner, Judge, in an antitrust action brought by Litton Systems, Inc. and some of its subsidiaries (Litton) against the American Telephone and Telegraph Company and some of its subsidiaries (AT&T). The awards were based on special jury findings that AT&T used its telephone monopoly illegally to monopolize the telephone terminal equipment market, thereby excluding Litton as a competitor, and imposing costs on Litton as a customer, of the AT&T system. The jury found that this was accomplished principally through opposing the adoption of certification standards and the imposition of tariffs filed with but not approved by the Federal Communications Commission (FCC). The tariffs required telephone customers to connect equipment purchased

from AT&T's competitors to the telephone system only through the use of a device designed by AT&T.

This device—called an "interface device" by Litton and a "protective connecting arrangement" (PCA) by AT&T—was used in lieu of a system of "certification standards." These standards would have regulated, as they indeed now do regulate, the kind of equipment that can be connected with the AT&T system to ensure interconnection compatibility. Under the AT&T tariff, however, Litton had to pay for the privilege, so to speak, of connecting to the system with a "black-box" of AT&T's devising. The tariff was eventually rejected by the FCC in favor of certification standards, and Litton's principal argument before the jury and to the district court was that AT&T's bad faith opposition to certification standards drove Litton out of the telephone terminal equipment market in the interim period between the filing and the ultimate rejection of the tariff. While our recounting of the facts will disclose many other complexities, pro and con, of Litton's case, certainly a crucial factor is the FCC's ultimate finding that the interface device was not needed to protect the AT&T network from harm. Various network users had long purchased equipment from AT&T's competitors, using it without an interface with "no demonstration of . . . harm" to the AT&T network. *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 56 F.C.C.2d 593, 598 (1975). The gist of Litton's case and the jury's findings is that the interface device was unnecessary and uneconomical and that AT&T at all times knew this was so, and that despite clear prior indications from the FCC that the tariff would be set aside as unreasonable and destructive of competition, AT&T nevertheless proposed and fought

to maintain the tariff—all in bad faith in order to exclude competition in the terminal equipment market.

AT&T raises a score of issues on appeal. In addition to disputing the evidence underlying the jury's verdict, AT&T argues that its opposition to certification standards was privileged under the First Amendment by virtue of the *Noerr-Pennington* doctrine because it merely advocated a position before a government agency. AT&T also claims that the district court erred in its evidentiary rulings, instructions to the jury, and handling of special interrogatories, and that the jury's damage award was not supported by substantial evidence and was inconsistent with certain jury findings in AT&T's favor. The jury verdict for Litton as an AT&T customer is attacked as both unsupported by the evidence and improper under the "filed tariff" doctrine of *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922) and the 'target area' standing doctrine, *see Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Finally, AT&T argues that Litton's misconduct during discovery, which resulted in the denial of attorneys' fees to Litton, warranted outright dismissal of the case. Litton appeals the denial of attorneys' fees and conditionally cross-appeals on the basis that the district court's instructions to the jury prevented it from recovering its full measure of damages.

Bearing in mind that in reviewing the jury's verdict the evidence must be viewed in the light most favorable to Litton, we affirm, holding the *Noerr-Pennington* doctrine inapplicable to Litton's suit as a competitor. We have considered all the parties' contentions and have found none requiring reversal. We find that the evidence was sufficient, both in terms of its weight and from the

standpoint of causation, to support the damage award and that the district court's instructions to the jury and evidentiary rulings were free from prejudicial error. We also uphold the verdict for Litton *qua* customer—no small sum, albeit almost wholly insignificant relative to the principal verdict. Although we are not without doubt, perhaps because the amounts involved are so large, we uphold the district court's imposition of discovery sanctions under Federal Rule of Civil Procedure 37 and therefore deny Litton's unconditional cross-appeal. Our disposition of the case renders consideration of Litton's conditional cross-appeal unnecessary. In affirming, we take due note that this case was a model of judicial technique for handling a serious, complex, and difficult jury trial. Irrespective of what we might say regarding certain of the rulings below that we think were questionable or debatable, if not reversible error, we commend the district court's handling of the case.

I. *BACKGROUND*

A. *Early Restrictions on Interconnection*

Prior to 1956, AT&T had an absolute monopoly over long distance telephone service and local telephone service in areas accounting for over eighty percent of this country's telephones. Independent telephone companies, familiar to many rural users, interconnected with AT&T's long distance network and provided local telephone service in those areas not serviced by AT&T. The AT&T "telephone network" comprised local central office switching systems as well as the wires and cables linking them with the businesses and homes of customers. This monopoly, administered under the aegis of the FCC, was recognized as perfectly lawful and proper.

But AT&T had another monopoly—not similarly sanctioned—over the sale and lease of individual telephone sets and business telephone systems. Broadly speaking, a business telephone system can be classified into one of two general categories. The first, a Key System, allows a single telephone set to connect several others through the use of buttons on the telephone. Key Systems are used primarily by small offices. The second category, a PBX System, employs a central console or switching mechanism to allow interconnection of up to several thousand telephones. Key Systems and PBXs—stipulated as the relevant product market in this case—are referred to in the industry as "telephone terminal equipment." AT&T's monopoly over such equipment (including residential telephones) was preserved after the expiration of Alexander Graham Bell's original patents by the simple expedient of prohibiting the attachment of non-AT&T equipment to the AT&T system. AT&T enforced this policy by cutting off service to customers who attached non-AT&T equipment.[1] This practice was approved first by state regulatory agencies and later by the FCC after it assumed regulatory responsibility for telecommunications under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* Because telephone terminal equipment sends electrical signals into the network, this policy was at that time considered necessary to ensure the safe and effective operation of the nationwide telephone network.[2]

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1 Western Electric, an AT&T subsidiary, manufactures telephone terminal equipment sold by AT&T.

2 The AT&T brief describes the *potential* harms to the telephone network from "unbridled terminal equipment" as follows:

> Improper voltages generated or transmitted by customer-provided terminal equipment can cause potentially hazardous electric shock to telephone company customers and employees. Longitudinal

After World War II, however, various users sought to connect devices that AT&T had always considered "foreign attachments" to the telephone network. Efforts to challenge AT&T's absolute prohibition against interconnection of non-AT&T equipment met with some limited success as early as 1947 when, in *Use of Recording Devices*, 11 F.C.C. 1033 (1947), the FCC approved the use of machines to record telephone conversations because such use was not "detrimental to the quality of telephone service." *Id.* at 1048. At the same time, the Commission ruled that interconnection must be made through "[a]dequate connecting arrangements," *id.* at 1048-49, but the responsibility for installing and maintaining connecting arrangements was vested in AT&T. The FCC's concern for the network's integrity was manifested in perhaps its most extreme form in *Hush-A-Phone Corp.*, 20 F.C.C. 391 (1955), where it prohibited the use of a mouthpiece shield designed to enhance user privacy

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> imbalance usually results from improper grounding of the telephone lines and can cause a user to hear increased noise or another voice (*i.e.*, crosstalk) on the telephone line. Excessive signal power also causes noise and crosstalk. Faulty network control signaling can cause numerous problems, including wrong numbers, false busy signals, and incorrect billing. . . . Although a minor problem might be acceptable to a particular customer, the combined effect of many such problems could impair telephone service for other customers.

Brief at 11 n.9

It is to be noted, however, that no proof of *actual* harm to the telephone network from interconnection with competitors' terminal equipment was ever adduced before the FCC, *see Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 56 F.C.C. 2d 593, 596, 598 (1975) (First Report & Order), or in this case. The FCC certification standards as set forth in the order cited above, and as subsequently amended, are nevertheless designed to prevent the occurrence of the four basic potential harms—hazardous voltages, excessive signal power levels, excessive longitudinal imbalance, and improper network control signalling. *Id.* at 601-11.

because, although the shield did not harm the network,[3] it could cause garbling of conversation. The Commission's ruling was set aside and remanded by the unanimous decision in *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956),[4] which found the ruling "neither just nor reasonable." In characterizing the ruling as an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental," *id.*, the *Hush-A-Phone* court suggested that actual harm to the telephone network was to be the principle governing the validity of interconnection prohibitions.

On remand, the FCC adhered to this principle by ordering AT&T to modify its tariffs to eliminate restrictions against the use of the Hush-A-Phone device and "any other device which does not injure [AT&T's] employees, facilities, the public in its use of [AT&T's] services, or impair the operation of the telephone system." *Hush-A-Phone Corp. v. American Telephone & Telegraph Co.*, 22 F.C.C. 112, 114 (1957). The ruling thus implicitly acknowledged that the AT&T network could be harmed by some forms of interconnection. *See* notes 2 & 3, *supra*. At the same time, the Commission's reference to "any other device" made it clear that the scope of the

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3 This depends on how "harm" is defined; AT&T has always advanced the idea that anything causing a user to hear increased noise or another voice (crosstalk) is harmful and that longitudinal imbalance and excessive signal power do just that. *See* note 2 *supra*.

4 The court stated:

> To say that a telephone subscriber may produce the result in question by cupping his hand and speaking into it, but may not do so by using a device which leaves his hand free to write or do whatever else he wishes, is neither just nor reasonable.

238 F.2d at 269.

ruling extended beyond use of the Hush-A-Phone device. Nevertheless, AT&T cast its revised tariff so as to prohibit interconnection of customer-provided telephone systems.[5]

At about the same time the *Hush-A-Phone* controversy was wending its way through the Commission and the courts, a Texas inventor by the name of Thomas F. Carter was inventing a mobile radio device that allowed its users to conduct two-way conversations with persons using ordinary, stationary telephones. The "Carterfone" used inductive and acoustic principles to connect the mobile user with a telephone "base station" that completed the

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5 Tariff FCC No. 132 provided in part:

B. GENERAL REGULATIONS

7. *Unauthorized Attachments or Connections.*—No equipment, apparatus, circuit or device not furnished by the telephone company shall be attached to or connected with the facilities furnished by the telephone company, whether physically, by induction or otherwise [except as provided in this tariff.] In case any such unauthorized attachment or connection is made, the telephone company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service.

24. *Miscellaneous Devices Provided by the Customer.*—The provisions of paragraph 7 preceding shall not be construed or applied to bar a customer from using devices which serve his convenience in his use of the facilities of the telephone company in the service for which they are furnished under this tariff, provided any such device so used would not endanger the safety of telephone company employees or the public; damage, require change in or alteration of, or involve direct electrical connection to, the equipment or other facilities of the telephone company; or interfere with the proper functioning of such equipment or facilities, or impair the operation of the telephone system or otherwise injure the public in its use of the telephone company's services. [Except as otherwise provided in this tariff,] nothing herein shall be construed to permit the use of [a recording device] or of a device to interconnect any line or channel of the telephone company with any other communications line or channel of the company or of any other person.

Quoted in Use of the Carterphone Device, 13 F.C.C.2d at 437 (brackets in original; footnotes omitted).

link to the telephone network.[6] Carter began marketing his device in 1959, and within a few years he had sold several thousand units in the United States and throughout the world. The AT&T tariff filed in response to the *Hush-A-Phone* decision was consistently interpreted as prohibiting the use of the Carterfone. *See Use of the Carterphone Device in Message Toll Telephone Service*, 13 F.C.C.2d 430, 438 (1967). Carter challenged the tariff in 1967, and the FCC hearing examiner found that with the exception of a single trivial incident, *id.* at 436, the Carterfone performed "satisfactorily without causing technical problems detectable by the user." *Id.* at 433. Because the Carterfone had no adverse effect on the telephone network, the examiner ruled that its use fell within the rationale of *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956), and that it was "unjust and unreasonable to continue to prohibit use of the Carterphone for the purpose of interconnection after its beneficial and harmless nature has been demonstrated." 13 F.C.C.2d at 439.

The Commission decision following the hearing held that the tariff was "unreasonable and unduly discriminatory." *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, 423 (1968). In contrast to the hearing examiner's conclusion that "a general prohibition against the use of interconnection devices is [not] unjust or unwise," *Carterphone*, 13 F.C.C.2d at 440, the Commission found the fact

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6 The Carterfone transmitted to a two-way radio at the base station serving the mobile radio system. To connect a telephone user to the mobile radio user, the base station's telephone handset was placed on a cradle in the Carterfone which automatically switched the radio to the transmitting mode when the mobile user spoke, and returned it to the receiving mode when he stopped—all this without any direct electrical connection to the telephone network.

> [t]hat the telephone companies may not have known prior to the proceedings herein that the Carterfone was in fact harmless is irrelevant, since they barred its use without regard to its effect upon the telephone system. Furthermore, the tariff was the carrier's own. It was not prescribed by the Commission.

13 F.C.C.2d at 425. The Commission further underscored its rejection of a blanket prohibition against interconnection when it noted that "[n]o one entity need provide all interconnection equipment for our telephone system any more than a single source is needed to supply the parts for a space probe." *Id.* at 424. It then invited the submission of "new tariffs which will protect the telephone system against harmful devices" and specifically stated that "the carriers . . . may specify technical standards if they wish." *Id.* at 426.

AT&T immediately sought reconsideration of the Commission's decision. In its order denying reconsideration, the Commission in a very real sense cemented its previous decision as follows:

> We held that the Carterfone filled a need, that its use did not adversely affect the telephone system, that its use was nevertheless precluded by the tariff, and that the tariff was unlawful, and had been in the past, because it prohibited the use of the Carterfone and other interconnecting devices without regard to actual harm caused to the telephone system. We did not prescribe the terms of a new tariff, but left that to the initiative of the telephone companies, pointing out that they were in no wise precluded from adopting reasonable standards to prevent harmful interconnection. Basic to our holding was a rejection of A.T.& T.'s position that because A.T.& T. cannot

control the interconnected private system, interconnection is by definition a degradation of the message toll telephone system without regard to the quality of the interconnecting device or of the interconnected mobile radio system, i.e., without regard to actual harmful effects. We viewed this position[2] and the rule embodying it as unreasonable. . . .

The primary contention upon reconsideration is that our decision permits the use of a myriad of customer-provided devices for interconnection without adequate exploration of the technical and economic problems. This record convinces us that there can be inter-connection without harmful technical effects. . . .

Use of the Carterfone Device in Message Toll Telephone Service v. American Telephone & Telegraph Co., 14 F.C.C.2d 571, 572 (1968).

> We found no substantial factors outweighing the necessity of eliminating the arbitrary tariff. Standards to prevent the introduction of harmful inputs can be devised, and enforcing them would be no more difficult than enforcing the present absolute prohibition. Furthermore, notification to the carrier of the installation of a connecting device, which would be a reasonable requirement, would greatly relieve any problems of discovering the source of any harmful interconnection. The record also showed that terminal devices may be used under a standard making actual harm a factor, and the distinction between terminal devices and interconnection appears to be solely one of function unrelated to inherent propensity for injurious effects.

Id. at n.2 (citations omitted).

Significantly, the Commission also noted the broad sweep of its decision:

> We also reject the related claim that the decision goes beyond the issues. To say, as some of the parties do, that the hearing related solely to the Carterfone and not to the validity of the tariff's broad prohibition would make the hearing essentially meaningless. The issues plainly included consideration of the basic validity of the tariff if it was the total prohibitory effect of the tariff which rendered its application to the Carterfone unreasonable. As we pointed out in our June decision, such a fault in a tariff can only be remedied by its revision. It should be noted in this connnection that it was well understood that this was an "interconnection" case, and A.T.& T. and General both argued on a broad base the need for a general prohibition against all interconnection not arranged by them.

Id. at 573. (footnotes and citations omitted)

We quote from the Memorandum Opinion and Order denying the petition for reconsideration at length for two reasons. First, a redacted version was submitted to the jury, a matter disputed by AT&T and considered by us, *infra*. Second, we believe that the clarity of the Commission's language was such that from AT&T's perspective it had to be clear as a bell, so to speak, that at least as of the 1968 *Carterfone* decision, if not before, it was unreasonable, unjust, and discriminatory to prohibit interconnection of terminal equipment without respect to any harm such devices might cause. The ruling by its very terms "require[d] tariffs reasonably addressed to the asserted problems." 14 F.C.C.2d at 573. It was therefore incum-

bent upon AT&T to devise tariffs that would permit attachment of non-harmful devices.

B. *The Interface Tariffs*

We suspect that the parties would disagree little with what we have said about the state of affairs up until the time of the *Carterfone* decision; at least they would agree on the facts, if not our interpretation of them. But what happened after *Carterfone* is hotly debated. Two quite different cases were presented to the jury and argued to us. The telephone company's scenario runs somewhat as follows.

1. *The AT&T Version*

The *Carterfone* decision was to become effective on November 1, 1968, whereupon—intolerably to AT&T—there would be no tariff provisions at all to limit equipment interconnection or specify interconnection standards. AT&T thus faced the prospect of proposing interconnection standards on very short notice with no FCC guidance and novel problems of "real" risks. *See* note 2 *supra*. In 1967, AT&T had formed a Tariff Review Group—perhaps in anticipation of the *Carterfone* ruling—to review possible tariff modifications. Although the Review Group thought performance or certification standards were feasible, this approach was viewed as posing weighty problems of a non-technical nature. Specifically, we are told, the Review Group feared that promulgation and enforcement of such standards by AT&T itself would raise serious antitrust questions. At the same time, the Review Group thought that improperly installed or maintained "good" equipment threatened the system's integ-

rity as much as "bad" equipment, and therefore concluded that a substantial degree of protection could be effected by requiring interface hardware—the "protective connecting arrangement" or PCA.[7] AT&T ultimately followed the Review Group's recommendation and adopted the PCA rather than the certification standards approach. Thus, in late October of 1968, AT&T filed a tariff requiring the use of a PCA to interconnect terminal equipment. AT&T was to provide, install, and maintain the PCA at the customer's expense as fixed by the filed tariff.

The filing of the tariff sparked a spirited response, with twenty-nine parties filing responsive pleadings and comments. Opponents of the tariff argued that the PCA approach was a flawed response to *Carterfone* because it failed to specify interconnection standards, barred the use of customer-provided telephones for network control signalling, and discriminated generally in AT&T's favor. In late December of 1968, the Commission permitted the proposed tariffs to take effect, stating in *American Telephone & Telegraph Co. "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 609-10 (1968), that the decision in "*Carterfone* does not hold that a customer may substitute his own equipment or facilities (whether it be telephone instruments, loops, poles, or central office equipments) for that furnished by the telephone company." Although the Commission allowed what we will call the "interface tariffs" to take effect, it explicitly stated that its action was not to be construed as "giving

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[7] The PCA mechanism generally combined in a single housing a "network control signalling unit," which AT&T had always claimed was necessary to protect against wrong numbers, false busy signals and incorrect billing, and a "connecting arrangement"; hence the term "protective connecting arrangement."

any specific approval to the revised tariffs," *id.* at 610, leaving entirely open the possibility of further action. In the interim, the Commission directed all segments of the telecommunications industry to engage in "informal engineering and technical conferences," to ascertain what "further changes are necessary, desirable, and technically feasible" in AT&T's tariff offerings. *Id.* at 610.

AT&T tells us that terminal equipment interconnection was the subject of much thought and engineering and economic consideration after the Commission decided to allow the interface tariffs to take effect. Throughout this period, however, AT&T concedes that it had no "statistically meaningful" data regarding actual harm to the network due to interconnection. AT&T Brief at 17-18 & n.21. But, AT&T points out, a National Academy of Sciences (NAS) report commissioned by the FCC ultimately found—the report took some ten months to prepare—that network harm could be caused by a variety of factors. The report concluded that, on balance, the PCA requirement was appropriate because, although a properly enforced certification system could also protect the network from harm, the responsibility for creating and administering such a system should be shouldered by a regulatory agency rather than a private concern. In apparent response to the NAS report, the FCC formed a PBX Advisory Committee in May of 1971. The committee, composed of representatives of various interested parties including, of course, AT&T, studied the feasibility of interconnection without the PCA requirement. AT&T continued to maintain that unlimited interconnection could harm the network.[8]

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[8] The only data AT&T produced, however, addressed effects on the network, such as crosstalk, rather than causes. Thus, in response to a request by the FCC Common Carrier Bureau for comments on

In June of 1972, while the PBX Advisory Committee was preparing its final report, the FCC instituted rule-making proceedings addressing the interconnection is-

certification standards proposals in October of 1973, AT&T in part submitted the following:

> It is often argued that the impact on the quality of service of the interconnection of customer-provided equipment is merely potential and not real or actual. This is simply not true. In fact, our experience is clearly to the contrary. For example, current studies [the "Hunt Studies"] indicate that intercity private line serving links equipped with at least one customer-provided terminal generated trouble reports at a rate at least 50 percent higher than did serving links equipped with telephone company-provided terminals only. The studies now in progress on message telephone lines are showing like results—the trouble report rate for lines equipped with customer-provided terminals is more than 25 percent higher than lines connected solely to telephone company-provided terminals. As we have previously reported to this Commission with respect to interstate voice grade private line data services, where the same minimum protection criteria apply as on the public switched telecommunications network, a sizable percentage (8.5 percent) of the customers utilizing their own data transmitting equipment were applying signal power in excess of the established network protective criteria, thereby degrading the service of other customers. The same survey showed, in the case of a particular type of connection or interface which is comparable to that encountered on public switched network services, that 18 percent of the customer-provided terminals violated the minimum network protection criteria by a substantial degree.

The comments did state, however, that:

> Complete and exhaustive statistics demonstrating all the harms from uncontrolled interconnection or the total impact on the quality of service might not be obtainable, given the nature of the problem studied. Certain effects simply are not measurable. How many wrong numbers or how much crosstalk occurs from the use of customer-provided terminals can only be observed at the time of or during their occurrence. The difficulties in making such measurements are apparent. However, the data cited above are sufficiently consequential to suggest that interconnection has an adverse impact on the quality of service. Certainly, for the reasons set forth in these comments, further loosening of interconnection policies, such as customer options embodied in the certification proposal before the Commission in this proceeding, is not in the public interest and should not be adopted.

(Footnote omitted).

sues. The FCC took the "extraordinary" step of convening a Federal-State Joint Board (Joint Board) pursuant to 47 U.S.C. § 410(c) (1976), to determine "whether, and to what extent, there is public need . . . to go beyond what we ordered in *Carterfone* and permit customers to provide, in whole or in part" network control signalling units and connecting arrangements. *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 35 F.C.C.2d 539, 542 (1972). AT&T points to these developments to buttress its claim that the need for and propriety of the PCA requirement was very much an open question, emphasizing the fact that it took the FCC almost four years after *Carterfone* to address the interconnection issue.

The PBX Committee submitted its final report shortly after the Joint Board convened in 1972. The report included a model certification program based on a "barrier PBX system" that would incorporate protective circuitry obviating the need for a PCA.[9] But by this time, after "lengthy internal debate," AT&T Brief at 21, AT&T decided to oppose certification standards as an unnecessary substitute for the PCA requirement. Mr. John deButts, then AT&T Chairman, announced this position in a speech before the National Association of Regulatory Utility Commissioners (NARUC) in late September of 1973. DeButts stated in his speech that the nationwide switching network was "too valuable a resource to risk a perhaps irreversible threat to its performance that would

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[9] AT&T claims that no equipment available at that time met the standards of the "barrier PBX" posited by the Advisory Committee and suggests that the concept was approved over its objection by non-AT&T chairpersons of Advisory Committee subcommittees. *See* AT&T Brief at 19-20 n.24.

ensue from fragmentation of responsiblity for that performance." Shortly thereafter, AT&T formally opposed the certification standard approach by filing comments in the FCC rulemaking proceedings.[10] That this opposition to certification standards was undertaken in bad faith was a principal special finding of the jury on which the verdict against AT&T turned.[11]

AT&T's decision to stand behind the PCA requirement greatly upped the odds against adoption of a certification standards system. AT&T seems to agree with Litton that the deButts speech was a coda marking Litton's demise as a competitor, but denies that it opposed certification standards in bad faith and argues that Litton's failure in the terminal equipment market was inevitable by late 1973, if not earlier. According to AT&T, Litton's efforts

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10 Elaborating some of the concerns expressed by deButts in his earlier speech, the comments stated:

> The public interest . . . will inevitably be impaired by the duplication of facilities and the division of responsibility that will ensue from further interconnection in an industry where compatibility of components and precise coordination of process are crucial. Interconnection has had an adverse impact on the innovative process in the telephone industry and the impact of certification would be even more detrimental.
>
> . . . [A]ny program of certification would, in our view, inevitably lead to the uncontrolled connection of customer-provided equipment to the telecommunications network. The ability to allocate responsibility for network performance would perforce be destroyed.

11 The finding of predatory or anticompetitive conduct was based in part on "opposing certification in bad faith." Other such conduct initially found was "bad faith refusal to sell inside wiring at all or on a reasonable basis."

After returning its initial verdict, at which time the jury could not agree on whether the interface device tariff had been *filed* in bad faith and whether there had been "bad faith delay in making cutovers," the jury further deliberated at the court's request and found for Litton on these issues as well: hence our use of the term "a principal special finding."

to establish itself in this market were short-lived, poorly executed, and plagued with internal difficulties ranging from inadequate staffing to high-level corporate bribery. Litton entered the market in 1971, selling equipment made by other companies, with the hope that it could quickly develop its own products to feed the distribution and service network it created immediately after *Carterfone*. But by 1973, AT&T claims, Litton had failed to develop the caliber of product needed to compete with AT&T's evolving line of terminal equipment. This fact, coupled with the revelation that certain Litton officials had bribed their way into contracts with terminal equipment users, prompted Litton to exit the market in early 1974. AT&T's rendering of Litton's short, unhappy run in the terminal equipment race suggests that Litton lost because it sprinted early and winded quickly, and not because AT&T squeezed Litton into the rail with the PCA requirement.

In any event, Litton decided to withdraw from the terminal equipment market in early 1974. It was not until November of 1975, AT&T points out, that the FCC adopted regulations establishing certification standards. *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 56 F.C.C.2d 593, 599-613 (1975) (First Report & Order).[12] Although the FCC

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[12] AT&T claims that certain FCC proceedings occurring prior to the adoption of certification standard regulations had the effect of placing the FCC's imprimatur upon the PCA requirement. *See Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *AT&T-Mebane Home Telephone Co.*, 53 F.C.C.2d 473 (1975). It is difficult to see how either of these decisions can be read to qualify the FCC's earlier, explicit statement that it was not approving the proposed tariffs, however. *Telerent* was a declaratory judgment order expressing the Commission's disapproval of a state

declined to include PBX and Key Systems in the certification program at that time, it expressed doubt regarding the Joint Board's recommendation that this equipment presented technical problems warranting general exclusion. AT&T perforce concedes that this ruling included statutory findings that the interface tariffs were "unnecessarily restrictive" and amounted to "unjust and unreasonable discrimination." *Id.* at 598. A few months later, the FCC amended its regulations to cover PBX and Key Systems that employed protective circuitry, *Interstate and Foreign Message Toll Telephone Service*, 58 F.C.C.2d 736 (1976) (Second Report & Order). The FCC's order was affirmed on appeal. *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).[13] Thus, as of October 1977, after certiorari was denied by the Supreme Court, interconnection of non-AT&T equipment employing protective circuitry became a possibility. Finally, in April of 1978, the FCC issued a third order eliminating the protective circuitry requirement for properly registered and installed PBX and Key Systems. *Interstate and Foreign Message Toll Telephone Service*, 67 F.C.C.2d 1255 (1978) (Third Report & Order).

utility commission's proposed rule that would absolutely prohibit the interconnection of customer-provided equipment on any intrastate portion of the telephone network. The Commission held that the proposed rule was contrary to the thrust of *Carterfone* and recently instituted proceedings considering the possibility of liberalizing the post-*Carterfone* tariffs. In *Mebane* a local telephone company sought exemption from so much of the post-*Carterfone* tariffs as allowed interconnection of customer-provided equipment. Although the Commission upon its own motion granted the local carrier an opportunity to demonstrate the need for a waiver from the tariffs on the basis of economic injury, it specifically ruled that, under *Carterfone*, customers must generally be allowed to provide their own equipment.

13 The appeal covered both the First and Second Report and Order in Docket No. 19528. 56 F.C.C.2d 593 (1975); 58 F.C.C.2d 736 (1976). The latter related to key systems and PBXs. *See* 552 F.2d at 1044.

To summarize, the AT&T scenario sketches a hard-fought battle before the FCC with good faith efforts being made to protect the network. AT&T points out that it was not alone in opposing certification standards; several other interested parties—e.g., NARUC, the Joint Board, and several state utility commissions—supported the PCA approach. AT&T relies on this support, and on the fact that it took over four years from the time Litton exited the terminal equipment market for the FCC to establish certification standards, to back up its claim that it was not AT&T's "bad faith" opposition to certification standards that drove Litton from business. As might be expected, Litton's scenario plays out quite differently.

2. *The Litton Case*

In Litton's scenario, AT&T is cast as a Dorian Gray. To paraphrase Commissioner Johnson's dissent from the order staying the effect of *Carterfone* pending AT&T response, to Litton, the PCA requirement was much as if an electric utility prohibited customers from using a toaster unless it was designed, manufactured, and installed by the utility itself. Litton's case against AT&T relies heavily on the fact that AT&T has never been able to make a case *for* the PCA requirement. Litton reminds us that AT&T has not demonstrated—before the FCC or at the trial of this case—a single instance in which the network had been harmed by a competitor's terminal equipment. Litton Brief at 8. Nevertheless, AT&T imposed the PCA requirement on all equipment sold by its competitors. Strikingly, in one case involving two Atlanta hotels using the very same brand of PBX equipment, no interface was required for the equipment that AT&T purchased from a third-party manufacturer and leased to one hotel, while an interface *was* required when the other

hotel purchased its equipment directly from the third-party manufacturer. Litton suggests, as did the Fourth Circuit in *North Carolina Utilities Commission*, that the PCA requirement was a naked attempt to maintain "private lawmaking authority over independent manufacturers." 552 F.2d at 1051 (emphasis omitted). The PCA requirement stood for almost ten years, giving AT&T a chance to interfere with the normal course of every sale of terminal equipment by Litton and all of AT&T's other competitors.

Litton's argument that AT&T opposed the development of certification standards in bad faith is based on evidence that Litton believes clearly demonstrates, first, that AT&T was aware that it could not substantiate its claims of harm to the network; second, that AT&T knew that without the PCA requirement it was vulnerable to competition; and, finally, that AT&T could have developed certification standards itself immediately after *Carterfone* but opted not to in order to buy the time necessary to meet competition in the terminal equipment market.

Litton put into evidence a number of AT&T documents to support the contention that AT&T simply could not demonstrate that the PCA requirement was necessary to protect the network from harm. Specifically, Litton points to an in-house report apparently prepared in 1971 by one of two AT&T representatives to the PBX Advisory Committee[14] which stated:

> *A Credibility Gap Exists*
>
> [L]imited interconnection on the message network and greater interconnection on private line facilities

[14] Litton claims in its brief that this report was prepared by a Mr. Byers. This appears to be the case; although the copy of the report in the appendix is unsigned, Byers' initials are typed in at the top. In any event AT&T does not dispute Litton's attribution of the report.

> has been in existence for a long period of time and the carriers still find it virtually impossible to cite cases of harm . . . result[ing] from . . . interconnect[ion] . . . . This inability to demonstrate cases of harm . . . is causing the manufacturers . . . users and regulatory bodies to . . . challenge the expansive efforts which [AT&T] insists must be taken to avoid the network pollution.

Litton Brief at 29-30 (emphasis omitted). To like effect is a 1972 report submitted to AT&T management by the Director of AT&T's Management Sciences Division stating that AT&T was in its "weakest position now, because even though everyone concedes that serious breaches of our tariffs by illegal or unauthorized equipment has grown over the years, we have not been able to produce evidence of harm to anyone." *Id.* at 30. The report recommended that the interface requirement be rescinded. Litton points out that AT&T's sole evidence of potential harm to the system was derived from the Hunt Studies referred to in note 8 *supra* and which were cited by AT&T to the FCC as support for the interface requirement. Various AT&T officials conceded that the studies did not "prove anything." Nevertheless, we know that deButts maintained in his 1973 speech and in the formal filings later submitted to the FCC that there were data supporting AT&T's position on network harm from interconnection.

Litton argues that a portion of the PCA device championed by AT&T was really no more than the dial or pushbutton mechanism of a telephone—the network control signalling unit—that only duplicated the function of the same mechanism in AT&T's competitors' equipment. Moreover, AT&T knew at the outset that the PCA re-

quirement was useless; a Task Force of the Tariff Review Group charged by AT&T management with developing "the strongest possible case to resist customer ownership of telephone equipment" had concluded in early 1968 that a PCA requirement would only "shift[ ] . . . [existing] restrictions on customer-owned devices to similar restrictions through the provision of an arbitrary and redundant Telephone Company device that duplicates the customer's equipment."[15] Litton highlights the fact that the internal AT&T Task Force characterized the PCA requirement as "a redundant, artificial and economic barrier to those wishing to purchase their own equipment." Thus, according to Litton, AT&T's own documents reveal its awareness as stated in a presentation by an AT&T executive at a Traffic Service Advisors' meeting in 1972 that "[o]nly the

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15 The task force report said, *inter alia*:

> An attempt to design an interface, or a family of interfaces, sufficient to minimize all adverse effects of customer-provided equipment poses an economic and administrative problem. . . . Such an interface device would be priced at a level of at least what our existing equipment offering is now. This would, of course, result in what effectively might be considered to be an unjustified economic restriction in allowing a customer to provide his own device. And the provision of an interface does not, in itself, necessarily provide the full protection we desire . . . .

The report also stated: "In general, the arguments against the provision of an interface remain the same, *i.e.*, redundancy, artificial economic barrier to the customer, impracticalities of administration, doubtful acceptance of customers, etc." The task force, in making its report to the Tariff Review Group explicitly rejected the interface device requirement and specifically endorsed technical standards:

> The entire concept of customer-owned equipment must be based on tariff type-approval of all terminal equipment, wiring, and apparatus, rather than on interfaces that would attempt to provide the degree of safety, quality of service, and flexibility for future services that we may wish to provide. The provision, by the Bell System, of families of interfaces for specific devices or of one interface, sophisticated enough to work with all services, would erect a redundant, artificial and economic barrier to those wishing to purchase their own equipment.

'black box' . . . stands as the last hardware barrier between us and the final challenge of unbridled, unlimited, no-holds-barred competition."

In Litton's account, AT&T's support for the PCA requirement was based more on a concern for its share of the terminal equipment market than it was on concern for the safety of the telephone network. Thus, AT&T kept the interface device not only to exclude competition but also to palliate its own competitive inadequacies because, despite the vaunted reputation of Bell Laboratories, AT&T had done little in the years prior to *Carterfone* to update its terminal equipment. Accordingly, notwithstanding the opinion expressed by several members of the AT&T Tariff Review Group that the PCA requirement was not responsive to *Carterfone*,[16] AT&T imposed the requirement in order to give it time to develop competitive terminal equipment. At trial, Litton put in evidence another AT&T document, the McKinsey Report, indicating that AT&T had product development and marketing problems that prevented it from meeting competition in the post-*Carterfone* era. Litton also claims that when AT&T finally did update its terminal equipment line, it did so with "Chinese copies" of successful Japanese products.

Finally, Litton maintains that AT&T could have adopted certification standards no more than a year after *Carterfone*. In support of this claim Litton again points to internal AT&T documents and memoranda suggesting that AT&T management believed the development of certification standards was inevitable by 1972, or 1973 at

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[16] *See* the minutes of Tariff Review Group meeting of July 11, 1968 noting that members Cohen, North, and Miller "feel and expressed themselves that current tariff efforts, particularly with respect to interconnection, is [sic] not at all responsive to FCC Carterfone decision."

the latest. Litton Brief at 31-32. Litton suggests that AT&T's participation in the PBX Advisory Committee was a ruse or delaying tactic, and that the decision to oppose certification was concealed from the FCC while AT&T appeared to cooperate with the Advisory Committee so as to avoid the appearance of bad faith.

If there is an individual villain in Litton's piece it is Mr. John deButts. DeButts took over as Chairman and CEO of AT&T about four years after *Carterfone* and stressed the fact to his management that AT&T would have only one policy with respect to certification standards: opposition. In the face of recommendations from subordinates that a certification standards approach was preferable to the PCA requirement, deButts nevertheless opposed the standards. Moreover, Litton argues that the AT&T position on certification, as dictated by deButts, was taken with full knowledge that the FCC would ultimately reject this position. Litton claims that AT&T understood that its opposition to certification exposed it to antitrust liability, citing an AT&T film simulating an antitrust trial of a suit similar to the one eventually filed by Litton and urging employees to destroy incriminating company documents. DeButts apparently remarked to AT&T lawyers shortly after his speech that he had created more opportunities for lawyers than anything "since Sherman wrote his famous law."

We thus arrive again at what both parties agree was a pivotal point for Litton in the interface tariff chronology: the deButts speech of 1973. In contrast to AT&T's claim that the PCA requirement amounted to only a little protection for the system that also served to avoid the antitrust difficulties that might flow from an AT&T enforced certification program, Litton argues that

AT&T's opposition to certification—its insistence upon the PCA requirement—posed psychological and economic market barriers that drove Litton from the terminal equipment market. On the psychological side, Litton claims that the very imposition of the PCA requirement, without regard to its cost or inconvenience, caused customers to doubt the quality of Litton's product. Litton analogizes its burden under the interface tariffs to that which would face a foreign car manufacturer if its ability to sell in the American market were conditioned upon including a giant fire extinguisher in the car's trunk. Litton also presented evidence tending to show that AT&T engaged in slash and burn tactics calculated to make cutover from AT&T to Litton equipment as bothersome as possible for Litton and its customers alike. AT&T installers from time to time would chop off existing AT&T wiring flush with office walls in preparation for the installation of Litton equipment. AT&T made the PCA requirement onerous for customers in other ways as well: refusing to acknowledge receipt of letters arranging cutover dates, changing cutover dates, or failing to provide the necessary PCA equipment. Finally, Litton argues that AT&T's PCA devices themselves occasionally malfunctioned, thus adding actual injury to technological insult.

The PCA requirement also effected a direct economic barrier to Litton's market entry insofar as it increased the cost of installing and using Litton equipment. Although this case did not involve single line telephone sets, i.e., residential telephones, Litton is quick to point out that the PCA requirement precluded all of AT&T's competitors from entering this market because the PCA cost alone exceeded the cost of renting a telephone from

AT&T.[17] Litton argues that these costs also effectively foreclosed sales of Key Systems involving five lines or less, estimated to be over 90% of the Key System market. In the market for larger Key Systems and PBX Systems, the PCA requirement was, in effect, a surcharge imposed by AT&T on customers using non-AT&T equipment sold by Litton and other competitors. When it became clear in late 1973 that AT&T would fight for the PCA requirement, Litton believed its only recourse was to cut its losses and leave the terminal equipment market because by that time AT&T had copied the successful products Litton was offering, narrowing whatever competitive advantage Litton would have had even in the absence of the PCA surcharge.

Thus, in Litton's scenario, AT&T's support for the PCA requirement—its opposition to certification standards—was no more than a rear guard effort to delay the effect of *Carterfone*, undertaken in bad faith in order to handicap competitors. The deButts speech slammed shut what was, from Litton's perspective, the "window of opportunity" created by *Carterfone*. Litton had intended to take advantage of this opportunity by following the same three-step market development program it had used successfully in other product markets.[18] First it engaged in

17 The monthly charge for the AT&T interface device was about $6.00, as compared to a residential phone rental rate of about $1.25 a month. Litton claims that the PCA requirement increased its Key Systems customers' costs by some 18 to 35 percent, depending on the size and type of installation, over what they would have been in the absence of the requirement. In the PBX Systems market, Litton claims the PCA requirement increased its customers' costs by 8 to 20 percent. Litton Brief at 48-49.

18 Litton's market strategy as outlined in its 1971 Business Telephone Systems Interconnect Opportunity Plan comprised three essential steps. The first step involved the creation of an extensive distribution and service network covering major metropolitan areas. In this first stage Litton planned to sell reliable terminal equipment manufactured

the sale of reliable products manufactured by other concerns—this to allow Litton the opportunity to establish an immediate market presence while it readied its own products. Litton compares its 1980 gross sales of close to five billion dollars with its start in 1953 as a small electronics company and emphasizes its highly successful progress and depth of skill in the telecommunications industry. In fact, Litton had extensive engineering and installation expertise in terminal equipment—highly sophisticated terminal equipment for special customers like airports and the Department of Defense. Litton's statistics indicate that, if anything, its performance exceeded its own expectations. Within a year and a half of its decision to enter the terminal equipment market, it was making close to one quarter of all interconnect sales. To counter AT&T's claim that Litton had no marketable products of its own in the early 1970's, Litton argues that AT&T itself was responsible for this: it refused to interconnect the innovative Litton "plexcom" switch, which was "years ahead" of anything AT&T had to offer. By this time, according to Litton, AT&T's anticompetitive efforts had taken their toll in increased prices and decreased sales. When the deButts speech made it clear that AT&T would continue to resist the implementation of *Carterfone*, Litton claims that, like many other manufacturers during that period, it simply could not remain in the market.

Ultimately, the jury agreed in the main with Litton, finding that AT&T opposed certification standards in bad faith and that other AT&T conduct involving the supply

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by established firms while it continued its own research and development efforts. In the second stage, Litton planned to introduce its own equipment to customers. In the third and final stage, the sales and distribution network would be expanded to cover the entire country, at which time Litton would sell and distribute its own products nationwide.

of PCAs and the sale of inside wiring was unreasonable and injurious to Litton as a competitor. The jury also, after rendering the main verdict with respect to liability and damages, found that AT&T *filed* the interface tariffs in the first instance in bad faith. Despite arguments made here that the damage award was based on a study relying on unsupported assumptions that made it impossible for the jury to estimate the damages attributable only to conduct found illegal, liability was found in a specific amount, namely, in the case of Litton *qua* competitor, $91,990,000, and in the case of Litton *qua* customer, $268,243. The sum of these figures, $92,258,243, was trebled as provided by 15 U.S.C. § 15.

II. *DISCUSSION*

A. *Introduction*

As the factual summary above suggests, there is little in this case that the parties agree upon. AT&T contends that a portion of the jury's verdict and two of its factual findings must be set aside because they were made "belatedly" and as a result of coercion. Second, AT&T argues that under the *Noerr-Pennington* doctrine the jury was precluded from finding that certain practices relied on to support both the initial and the "belated" verdict were anticompetitive or predatory. Third, AT&T maintains that there was insufficient evidence to support any of the jury's factual findings and the entire verdict must therefore be set aside. Fourth, again in an evidentiary vein, AT&T claims that various rulings by the trial court judge on the admissibility of evidence so prejudiced its defense that it is entitled to a new trial. AT&T's fifth argument flanks the merits, so to speak, and attacks the jury's damage awards. Finally, AT&T argues that the entire case

should have been dismissed as a sanction for Litton's discovery misconduct. Litton argues that this misconduct was an excusable oversight and that the district court's sanction—denial of any attorneys' fees—was impermissibly severe.

B. *The "Belated" Jury Findings*

After eight days of deliberation, the jury found AT&T guilty of monopolization and an attempt to monopolize the relevant product market. In response to special interrogatories the jury specifically found three AT&T practices—opposition to certification, delay in providing interface devices, and conduct in connection with the sale of inside wiring—anticompetitive and predatory. Because the jury found that AT&T's monopolization was the proximate cause of Litton's injury, it entered an award for Litton as both a competitor and customer of AT&T. The jury initially failed, however, to reach unanimity on three matters: (1) whether the attempted monopolization proximately caused Litton's injury, and whether either (2) the original filing of the interface tariff or (3) delay in effecting cutover from AT&T to Litton equipment was anticompetitive or predatory. The trial judge asked the jury to attempt to reach a unanimous result one way or the other on the remaining issues and the jury indicated its willingness to do so. After deliberating a short while, the jury returned with affirmative answers favorable to Litton on all three questions. AT&T makes an extensive argument that these "belated" findings were coerced and therefore should be set aside. Although the verdict on the monopoly charge can be sustained, and the damage award affirmed, if there is support for each of the initial three findings made pursuant to Federal Rule of Civil Procedure 49, *see Northeastern Telephone Co. v. AT&T*,

651 F.2d 76, 94-95 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1438 (1982), disposition of the threshold claim that these later findings must be set aside will enable us to consolidate our discussion of the more difficult *Noerr-Pennington* issues AT&T raises.

It was, of course, completely appropriate to submit special interrogatories to the jury, particularly in a case as complex and protracted as this one.[19] In asking the jury to specify whether it found each of the alleged predatory practices to have been proved, the trial court was merely following *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 299 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). For whatever reason, the jury did not agree unanimously on two interrogatories and the proximate cause component of the attempted monopolization charge. There was nothing unusual, much less erroneous, in the trial court's resubmission of these questions. *See, e.g., Turchio v. D/S A/S DEN NORSKE AFRICA*, 509 F.2d 101, 105 (2d Cir. 1974) (if the jury fails to answer interrogatory it is appropriate to resubmit the interrogatory "a second and third time to obtain answers to the unanswered questions").[20]

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19 The practice has been described as "usually preferable to the opaque general verdict." *Skidmore v. Baltimore & Ohio RR. Co.*, 167 F.2d 54, 67 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948). *See also* Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199, 206 (1966) (submission of special verdicts can serve to clarify confusing or complicated litigation).

20 Indeed, if the jury had found against Litton on the proximate cause question relating to the attempted monopolization charge, the trial court judge might reasonably have inferred that this was inconsistent with the jury's general verdict and damage award. The record indicates that this possibility was of some concern to both the trial court judge and the attorneys for both parties. In light of the express provision in Fed. R. Civ. P. 49(b) that a trial court may "return the jury for further consideration of its answers and verdict" in order to eliminate any inconsistencies between a general verdict and special findings, we do

AT&T's contention that the jury was somehow "coerced" into rendering answers favorable to Litton upon resubmission cannot be squared with the facts. The jury did not indicate that it was deadlocked on these questions; it indicated that it was divided. That the jury took its task seriously and deliberated conscientiously is manifest; before rendering its initial verdict the jury requested guidance from the court as to whether it could continue if it was divided on a question. AT&T can hardly argue that the jury was predisposed to find in Litton's favor given the fact that it found *against* Litton on two out of four theories of liability and divided on a third.[21] AT&T's argument that the jury had no incentive to find against Litton on the unresolved proximate cause question because the initial verdict would stand in any event is pure speculation. Even if we were to concede AT&T's premise that the jury was likely to shirk its duty conscientiously to reconsider these questions—a premise we find highly questionable given that the jury served over five months without a single absence and deliberated for eight days[22]—the conclusion that it was likely to resolve these questions in Litton's favor simply does not follow.[23]

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not see how it can be error to "return the jury for further consideration" of an interrogatory it did not answer.

21 Specifically, the jury found against Litton on its claim that AT&T engaged in a conspiracy to monopolize (claim three) and in a conspiracy to restrain trade (claim four).

22 The trial court judge praised the jury at the close of the trial as follows:

> Not a single juror has missed a single day because of illness or any other personal matter. . . . That is absolutely amazing . . . . You have also been the most punctual jury I have ever had. . . . You have been a vindication of the jury system and all that it means.

23 AT&T's argument that the jury had no incentive to find against Litton on one claim because it had found for Litton on another is a

Nor do we find anything coercive in the trial judge's instructions. The jurors were informed that their answers to the questions were "important" and that they should listen to the views of their fellow jurors without abandoning their own conscientiously held views. Far from being coercive, this instruction was completely in keeping with the recognition that:

> A system which requires the unanimous verdict of a jury . . . can function satisfactorily in most cases only because most jurors are reasonable . . . and after a certain amount of discussion has produced a large majority in favor of one view, those in the minority may be willing to join the majority in the belief that if so many other reasonable people have a contrary view, the views of the minority may well be mistaken. Instructions . . . in both state and federal courts stress the importance of jurors listening to the views of one another and making allowance for the fact that there can be a reasonable difference of opinion.

Grace Lines, Inc. v. Motley, 439 F.2d 1028, 1033 (2d Cir. 1971) (Lumbard, C.J., *concurring*). The instructions here fall far short of those sustained in ***e.g., United States v. Corcione***, 592 F.2d 111, 117 n.5 (2d Cir.), ***cert. denied***, 440 U.S. 975 (1979) (after jury deadlocked on criminal charge, trial judge instructed jury that it should "consult with one another and . . . deliberate with a view to reaching agreement if you can possibly do so"); ***United States v. Robinson***, 560 F.2d 507, 511 n.6 (2d Cir. 1977),

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criticism that can be made whenever a plaintiff's case involves multiple claims, any one of which would be sufficient to support a damage award. Thus viewed, AT&T's position is more an indictment of the jury system than an argument against resubmission.

cert. denied, 435 U.S. 905 (1978) (jury instructed that "[i]t is important that a decision . . . be reached here, and I really see no good reasons why a decision cannot be reached").[24] Litton was entitled to a jury determination on all of its claims and we do not believe the trial court judge erred either in resubmitting the claims or in instructing the jury as he did. There is no factual or logical basis for AT&T's arguments that resubmission of these questions tipped the balance in Litton's favor.[25]

C. *AT&T's* Noerr-Pennington *Claims*

According to AT&T, the "fundamental error that pervaded the trial of this case was the failure of the trial court to recognize that the principal . . . conduct upon which the judgment is based . . . was protected" under

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24 AT&T's contention that the trial court judge "pressured" the jury into resolving the undecided questions in Litton's favor is based on the following instruction:

> [A]ny question that is left unanswered creates a possible problem for the parties and the Court. I don't need to give you specific examples of that. It is a fact that we would like positive answers of either 'yes' or 'no' to the questions, *if you can possibly agree after discussing the matter again . . . to see whether or not you can't in good conscience* adopt [the views of other jurors] as your own. It will clear up a lot of problems for us if you can.

(Emphasis added.)

This instruction correctly emphasized both the importance of reaching a verdict and the necessity of doing so only in accordance with the conscientiously held views of each juror. If the trial court judge had elaborated upon the "possible problem"—i.e., inconsistency between a general verdict in Litton's favor and negative finding on the attempted monopolization proximate cause question—we might be inclined to agree with AT&T that the effect could be to bias the jury. But this is precisely the effect that the trial court judge avoided by phrasing the instruction as he did.

25 We note that under the trial court judge's instructions the jury could have, but did not, increase the damages it previously awarded Litton. Empirically, this undercuts AT&T's contention that the jury was predisposed to find against it.

the doctrine developed in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). AT&T Brief at 43. AT&T argues that both its opposition to certification standards and its original filing of the interface tariffs should not have been submitted to the jury because this conduct did not, as a matter of law under the evidence adduced by Litton, fall within the only exception—the so-called "sham" exception—to *Noerr-Pennington*.

Noerr, it will be recalled, involved a deceptive political campaign waged as part of the bitter economic feud between the railroad and trucking industries for control of the interstate, heavy freight hauling market. Trucking industry representatives sued a railroad trade association, alleging that a publicity campaign advocating legislation favorable to the railroads violated the Sherman Act because the campaign's sole purpose was to hamper the trucking industry's ability to compete with the railroads. The Court held that "the Sherman Act . . . does not apply to . . . activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws," 365 U.S. at 138, irrespective of whether the activities might be considered fraudulent or deceptive. The *Noerr* holding was, strictly speaking, a matter of statutory construction,[26] but First Amendment concerns clearly informed the decision. The Court feared that an expansive construction of the Sherman Act would impinge upon the right to petition and impair the government's ability "to take actions through its legislature and executive that operate to restrain trade." 365 U.S. at

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[26] *See* 365 U.S. at 132 n.6. *See generally*, Fischel, *Antitrust Liability for Attempts to Influence Governmental Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. Chi. L. Rev. 80, 82-84 (1977).

137.[27] These factors, as well as the "essential dissimilarity" between joint efforts to seek legislation and "agreements traditionally condemned" under the Act, *id.* at 136, led the Court to conclude that Congress could not have intended the Act to reach such behavior. In reaching this result, the Court found the question of intent irrelevant, stating that "insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." 365 U.S. at 139-40. In dictum, however, the Court indicated that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144.

The *Pennington* decision restated, and to some extent arguably amplified, *Noerr.* In *Pennington* an industry union and large firms urged the Secretary of Labor to establish minimum wage levels that would have the effect of squeezing out smaller firms.[28] The Court held that

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27 The Court was concerned that construing the Sherman Act to reach essentially political activity would hamper the "ability of the people to make their wishes known to their representatives," 365 U.S. at 137, thus invoking a traditional First Amendment theme. *See also id.* at 138; A. Meiklejohn, Political Freedom 26-28 (1948); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

28 The conduct challenged in *Pennington* included efforts to induce the TVA, a government corporation, to curtail its purchases of coal at reduced prices on the spot market. The Supreme Court did not address the issue, but some lower courts have concluded *Noerr-Pennington* does not immunize anticompetitive efforts directed at government agencies acting in a proprietary capacity—i.e., as buyers or sellers. *See, e.g., Sacramento Coca-Cola Bottling Co. v. Chauffeurs Teamsters & Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied*, 404

"*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670. *Pennington* made it clear that efforts directed at executive officials or agencies—as distinguished from the legislative and publicity efforts involved in *Noerr*—were protected. *Pennington* also emphatically reaffirmed *Noerr's* holding that anticompetitive intent did not make an otherwise legitimate attempt to secure governmental action or express a political position illegal; the Court stated that "[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.*

The last case generally cited in any exegesis of the *Noerr-Pennington* doctrine is *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). This case involved a group of trucking companies that opposed " 'with or without probable cause, and regardless of the merits of the cases,' " each and every license application made by the group's competitors to a state regulatory agency. *Id.* at 512. *California Motor Transport* both expanded and limited the *Noerr-Pennington* doctrine. Although the Court ultimately held against the defendants, it broadened and strengthened the base of the doctrine by holding, first, that it applied to administrative and adjudicative proceedings and, second, that it was constitutionally based.[29] At the same time, the Court

U.S. 826 (1971); *George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). A Fifth Circuit case, and a district court decision in the Third Circuit, are *contra*. *See Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152 (5th Cir. 1971) (reh. en banc); *United States v. Johns-Manville Corp.*, 259 F. Supp. 440 (E.D. Pa. 1966).

[29] 404 U.S. at 510-11. The *California Motor Transport* Court squarely held that First Amendment rights of petition and association underlay

imposed limits upon the doctrine by holding that the plaintiff's allegations triggered the application of the *Noerr* sham dictum.

AT&T points primarily to the *Noerr* and *Pennington* decisions and argues that even if its conduct was undertaken for anticompetitive reasons, it was nevertheless protected. To this Litton replies that *Noerr-Pennington* is inapplicable because AT&T injured Litton not by requesting or as a result of governmental action, but by virtue of what AT&T itself did in filing and maintaining the interface tariffs while opposing the only feasible alternative—certification standards—in bad faith. In the alternative, Litton maintains that this case presents a "paradigm of the 'sham' exception to the *Noerr* doctrine." Thus, there are two strings to the Litton bow: inapplicability of the *Noerr-Pennington* doctrine because the injury flowed from actions not within the scope of the doctrine, and applicability of the "sham" exception. Judge Meskill and I agree with Litton on both counts for reasons we set forth below; Judge Kearse concurs only on the second ground and does not join in the immediately following portion of the opinion.

1. *Applicability of the* Noerr-Pennington *Doctrine*

AT&T characterizes its filing of the interface tariffs after *Carterfone* as an "application" to the FCC, and contends that "*Noerr-Pennington* . . . does not permit antitrust liability to be based on such applications to a regulatory agency." AT&T Brief at 82. In essence, AT&T's argument is that its conduct in devising and filing the

the *Noerr-Pennington* doctrine. The *Noerr* Court only went so far as to suggest that an interpretation of the Sherman Act contrary to the one it adopted "would raise important constitutional questions." 365 U.S. at 138.

tariffs is immunized because the tariffs were contested and AT&T defended them before the FCC. If this argument were accepted, a common regulatory practice[30] designed to protect consumers would instead shield from antitrust liability the very entities the practice seeks to restrain and regulate. In an earlier case involving this same defendant we concluded that pervasive regulation of the telecommunications industry does not, without more, confer antitrust immunity. *See*, *Northeastern Telephone Co.*, 651 F.2d at 83; *see also International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975); *cf.*, *United States v. American Telephone & Telegraph Co.*, 524 F.Supp. 1336, 1357-60 (D.D.C. 1981) (declining to decide whether compliance with regulatory mandates insulates a defendant from antitrust liability.) If extensive substantive regulation does not warrant an antitrust exemption, then surely an essentially procedural aspect of regulation—tariff filing—cannot.

Apart from the obvious difficulty of reconciling the effect of AT&T's *Noerr-Pennington* argument with the Supreme Court's repeated admonition that antitrust ex-

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30 *See, e.g.*, 14 C.F.R. § 221.3 (1982) (Civil Aeronautics Board) (requiring all domestic and foreign air carriers to file "tariffs showing all rates, fares, and charges" for air transportation); 18 C.F.R. § 35.1(a) (1982) (Federal Energy Regulatory Commission) (requiring "[e]very public utility [to] file . . . full and complete rate schedules . . . setting forth all rates and charges for any transmission or sale of electric energy"); 46 C.F.R. § 531.3 (1981) (Federal Maritime Commission) (requiring "[e]very domestic offshore carrier [to] file . . . tariffs showing its actual rates, fares and charges"). Filing requirements like those cited above and those imposed by the FCC under § 47 C.F.R. § 61 *et seq.* (1981) hearken back to the original justification for administrative regulation of industries affected with a public interest: preventing discrimination on the basis of price or terms of service. *See generally* Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 Harv. L. Rev. 1105, 1106-07 (1954).

emptions are to be countenanced only where "there is a 'plain repugnancy between the antitrust and regulatory provisions,' " *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975), *quoting United States v. Philadelphia National Bank*, 374 U.S. 321, 350 (1963); *see also Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963), we believe that AT&T's position must be rejected for a more fundamental reason. AT&T erroneously assumes that a mere *incident* of regulation—the tariff filing requirement—is tantamount to a request for governmental action akin to the conduct held protected in *Noerr* and *Pennington*. But in this case, as in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962), the *Noerr-Pennington* doctrine is "plainly inapposite" because AT&T was "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." The decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC; AT&T's power to exclude Litton and other competitors from the telephone terminal equipment market resulted not from the FCC's regulatory authority but from AT&T's exclusive control of the telephone network.[31] AT&T cannot cloak its actions in *Noerr-Pennington* immunity simply because it is required, as a regulated monopoly, to disclose publicly its rates and operating procedures. The fact that the FCC might ultimately set aside a tariff filing does not transform AT&T's independent decisions as to how it will conduct its business into a "request" for governmental

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[31] *See also United States v. American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981) (analyzing AT&T's monopoly over local telephone service in terms of the "essential facility" or "strategic bottleneck" doctrine).

action or an "expression" of political opinion.[32] Similarly, the FCC's failure to strike down a tariff at the time of its filing does not make the conduct lawful, particularly where, as in this case, the agency specifically declines to rule on a tariff's legality.

We therefore follow the plurality in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976), where four Justices rejected AT&T's *amicus curiae* argument that a tariff filing was protected as a request for governmental action under *Noerr-Pennington*. In *Cantor*, the plurality held that a tariff filed by an electric utility could not

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32 Under applicable federal regulations, AT&T could have at any time revoked the interface tariff on its own initiative by filing another tariff. 47 C.F.R. § 61.57(a) (1981). We concluded almost ten years ago in *American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865, 871-76 (2d Cir. 1973) that sections 203 and 205 of the Communications Act of 1934 contemplated "carrier initiated rate changes" that the FCC could set aside only in the manner prescribed by the statute itself. The obverse of this, of course, is that a tariff is an independent exercise of the carrier's business judgment that receives no government imprimatur until and unless the FCC reviews the tariff in response to a complaint or upon its own initiative. A number of other courts have reached the same conclusion. *See Phonetele, Inc. v. American Telephone & Telegraph Co.*, 664 F.2d 716, 7[illegible], 735 (9th Cir. 1981) (FCC does not adopt or approve tariff filings it permits to become effective; tariff filings are "the product of the regulated entity's independent initiative and judgment"); *Sound, Inc. v. American Telephone & Telegraph Co.*, 631 F.2d 1324, 1330 (8th Cir. 1980) ("Bell, not the FCC, proposes its rates, regulations and restrictions . . . . In filing each tariff, Bell implements its own business judgment . . . ."); *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 374 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) ("[T]he tariff provisions of the Communications Act . . . embody a considered legislative judgment that carriers should in general be free to initiate . . . new rates or services . . . unless and until the Commission, after hearing, determines that such rates or practices are unlawful . . . .").

We note that AT&T's argument does not rely on the "filed tariff" doctrine of *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 162 (1922). *See City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981) ("filed tariff" doctrine inapplicable where regulatory agency expressly refuses to commit itself and tariff is ultimately disapproved).

evade scrutiny under the antitrust laws simply because it was filed in accordance with state law and approved by a state agency. The *Cantor* plurality stated that

> nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.

Id. Chief Justice Burger did not concur in that portion of the plurality's opinion discussing *Noerr-Pennington*, but his objection went to the plurality's construction of the "state action" exemption doctrine under *Parker v. Brown*, 317 U.S. 341 (1943), and he said nothing in disagreement with the plurality's interpretation of *Noerr.* Justice Blackmun's concurrence also did not address *Noerr*, but rather would rely on "a rule of reason, taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits." 428 U.S. at 610. Although we are aware that plurality opinions can provide only limited guidance on an issue a majority of the Court did not address,[33] we believe that to the extent that both

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[33] The Court has indicated that in interpreting plurality holdings lower courts should look to the "narrowest ground" relied upon in a concurring Justice's opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion). Although this rule seems of limited utility where, as here, the concurring Justices do not address the issue in question, it seems plausible to assume that if either Chief Justice Burger or Justice Blackmun felt there was merit to the *Noerr-Pennington* argument made by the defendant or AT&T as *amicus*, they would not have concurred in the judgment. Nor is it entirely clear that the dissenting opinion written by Justice Stewart and joined by Justices Powell and Rehnquist

Justice Blackmun and Chief Justice Burger were unwilling to equate "state action" with a utility's adherence to a tariff filing required by state law, they would reject *a fortiori* the argument that the tariff filing amounted to a request for governmental action.[34]

Much of our analysis relating to the filing of the interface tariffs applies to AT&T's opposition to certification. Opposition to certification is simply the other side of the interface tariff coin; AT&T's filing and maintenance of the PCA requirement was the very embodiment of opposition to the only feasible alternative—certification standards. To be sure, AT&T argues that its "opposition" to the development of certification standards was by definition protected under *Noerr-Pennington* because it amounted to no more than espousing a position before an administrative body. But our review of

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would hold AT&T's conduct in this case protected under *Noerr-Pennington*. Although the dissenting opinion stated that

> *Parker, Noerr,* and *Goldfarb* point unerringly to the proper disposition of this case . . . . The utility company . . . engages in two distinct activities: It proposes a tariff and, if the tariff is approved, it obeys its terms. The first action cannot give rise to antitrust liability under *Noerr* and the second—compliance with the terms of the tariff under the command of state law—is immune from antitrust liability under *Parker* and *Goldfarb*.

428 U.S. at 624, the tariff in question in *Cantor* was apparently specifically approved by the state regulatory agency. *Id.* at 583. In this case, of course, the FCC took pains to state that permitting the tariff to take effect was not to be construed as approval of the tariff.

34 We note that Chief Justice Burger stated in his concurring opinion that the plurality "correctly concludes: 'The Commission's approval of respondent's decision to maintain such a program does not . . . implement any statewide policy.' " 428 U.S. at 604. The Eighth Circuit has recently read *Cantor* as not providing *Noerr-Pennington* protection for tariff filings. *See City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1181 (8th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3026 (U.S. June 11, 1982) (No. 81-2278). *See also United States v. Title Insurance Rating Bureau of Arizona, Inc.*, 517 F. Supp. 1053, 1059-60 (D. Ariz. 1981).

the evidence presented by Litton suggests that AT&T's *post hoc* characterization of the opposition-to-certification issue is distorted. Litton's evidence indicated that AT&T made unsupportable claims to the FCC regarding network harm, feigned cooperation with the PBX Advisory Committee's efforts to develop certification standards, and generally attempted to buy as much time as possible to improve its own competitive position at the expense of Litton and other competitors.[35] The effect of this was to maintain the interface tariffs and whatever anticompetitive or exclusionary effect that flowed therefrom. AT&T's opposition to certification accordingly embraced much more than merely advocating a position before the FCC.

2. *The "Sham Exception"*

Even if our conclusions regarding the applicability of *Noerr-Pennington* are incorrect, the doctrine is subject to the sham exception suggested by way of dictum in *Noerr* and relied on in *California Motor Transport*. In *California Motor Transport* the defendant instituted proceedings challenging the regulatory approval sought by the plaintiff not with the expectation of prevailing but for purposes of harassment and delay. The Court held that where "the administrative and judicial processes [are] abused," 404 U.S at 513, in an attempt to stifle competition,

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[35] We review this evidence in greater depth in our discussion of the sham exception, *infra*, but we believe that this evidence tends to show that the conduct fairly considered under the rubric of "opposition to certification" amounted to more than simply an expression of AT&T's opinion. *Cf. City of Kirkwood v. Union Electric Co.*, 671 F.2d at 1181 ("The *Noerr-Pennington* doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results. It is not for expression of opinion that [the plaintiff] seeks to compel [the defendant] to respond in damages, but rather for [the defendant's] conduct in the market place.").

Noerr-Pennington is inapplicable. The focus of the Court's concern in *California Motor Transport* was the "illegal result" of the abuse, specifically, "effectively barring respondents from access to the agencies and the courts." *Id.*[36] Although the Court conceded that an "abuse" standard involved "a difficult line to discern and draw," a leading antitrust commentator has suggested that this line is crossed when

> the defendant's activity was intended to injure the plaintiff directly rather than through a governmental decision. When the antitrust defendant had not truly sought to influence the governmental decision, his invocation of governmental machinery is a sham. . . . [W]here he had no reasonable expectation of obtaining the favorable ruling, his effort to do so was a sham.

P. Areeda, Antitrust Law ¶ 203.1a (Supp. 1982).

Professor Areeda's view of the heart of the sham exception—invoking the process of administrative or adjudicatory decisionmaking for the injury that the process alone will work upon competitors—possesses the virtue of accommodating the Supreme Court's concern in *Califor-*

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36 We reject the suggestion made in AT&T's brief that the applicability of the sham exception turns on whether a competitor is barred from access to administrative agencies or the courts. The Supreme Court's opinion in *California Motor Transport* cited access barring as one example of the illegal results that might flow from abuse of the administrative process. One of the allegations in *California Motor Transport* that the Court found sufficient to trigger the sham exception is similar to the one Litton made in this case, namely that the defendants "became 'the regulators of the grants of rights, transfers and registrations.'" 404 U.S. at 511. More recent Supreme Court opinions have referred to the sham exception's availability without regard to the necessity of "access barring," *see, e.g.*, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 405 (1978); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 n.6 (1977) (Rehnquist, J., concurring).

nia Motor Transport that these processes not be abused with impunity behind claims of *Noerr-Pennington* immunity. To be sure, there are difficulties involved in determining whether a defendant "truly sought to influence the governmental decision" and whether there was a "reasonable expectation" of doing so. One indicium of whether a defendant could have reasonably expected its position to prevail, and therefore whether the invocation of process was actually an attempt to influence a decision rather than an attempt to interpose delay, is a "pattern of baseless, repetitive claims." 404 U.S. at 513. Thus, we held in *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896 (2d Cir. 1981) that an attempt by a defendant to delay the construction of a competitor's shopping mall by carefully orchestrating a series of court and administrative actions designed to defeat a zoning variance was not protected under *Noerr-Pennington*.

But repetition is but one indicium of a sham claim; under *California Motor Transport's* abuse standard "many other forms of illegal and reprehensible practice . . . may corrupt the administrative or judicial processes and . . . result in antitrust violations." 404 U.S. at 513. In *Landmarks Holding*, for example, our conclusion that the judicial and administrative processes had been abused was based in part upon "unethical lawyer conduct" which included, *inter alia*, requests for delays that the defendant's own documents proved were "purely bull." 664 F.2d at 894.[37]

In deciding whether Litton adduced sufficient evidence to demonstrate that AT&T's conduct in connection with the interface tariff and opposition to certification was a

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[37] *Cf.* Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 Harv. L. Rev. 715, 726-35 (1973).

sham, we are of course required to view the evidence in the light most favorable to Litton, giving it the benefit of all inferences that the evidence fairly supports regardless of whether contrary inferences might be drawn. *Continental Ore Co.*, 370 U.S. at 696; *Taxi Weekly, Inc. v. Metropolitan Taxicab Board of Trade, Inc.*, 539 F.2d 907, 911 (2d Cir. 1976). With this in mind, and with reference to the Litton case set out above in I(B)(2) which we think is fairly supported by the evidence, we believe that the sham exception is applicable to AT&T's conduct. As early as the ultimate decision in *Hush-A-Phone*, AT&T knew that the FCC's basic position was that AT&T could not exclude "any device"—a category clearly including telephone terminal equipment—absent a showing of actual harm. The lengthy litigation in *Carterfone* was a matter of industry-wide knowledge and interest; the decision was viewed at the time as a smashing blow to AT&T and as a "window of opportunity" for AT&T's competitors. Anyone reading the language of the *Carterfone* rehearing decision and the Tariff Review Group Task Force Report we have quoted above could conclude that neither filing of the interface tariff nor opposition to certification squared with the FCC's mandate in *Carterfone*.

AT&T nevertheless consistently maintained that the PCA requirement was necessary to protect the telephone network. This was not so much a "pattern of . . . repetitive claims" as it was a unitary, ongoing claim.[38] There was sufficient evidence to allow the jury to conclude that this claim was "baseless"; AT&T's own reports

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[38] The Circuits are split on whether a single claim is sufficient to support application of the sham exception. *See Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1266-67 & n.24 (9th Cir. 1982) (concluding that a single claim can be a sham and citing cases on both sides of the proposition).

pointed out that the interface device was redundant, uneconomic, and unnecessary. Time and again AT&T inveighed against the harm that would flow from certification standards without once demonstrating a single instance of harm from what its own reports indicated was a trend in the direction of "illegal" or "unauthorized" interconnection. AT&T asserts that evidence of harm was difficult to produce because of its transitory nature and because the PCA requirement was effective, but the jury could have reasonably concluded—on the basis of evidence indicating that governmental agencies and some 1600 non-AT&T telephone companies were interconnected without a PCA—that AT&T's ongoing claim of harm to the system was baseless.

There was also evidence tending to indicate that AT&T affirmatively misled the FCC with respect to the need for the PCA requirement and the difficulty of developing certification standards. For example, while it opposed certification standards pursuant to the policy announced before NARUC in the deButts speech, AT&T provided the FCC with a study that its own author believed did not prove anything. Similarly, AT&T's own documents indicate that many of its senior executives thought that certification standards could be developed within a matter of months. Indeed, some AT&T documents demonstrated that many AT&T executives believed the standards were inevitable regardless of the position AT&T adopted.

Not surprisingly, AT&T argues that intra-corporate division of opinion on an issue of this nature is inevitable and therefore not indicative of an attempt to subvert the regulatory process. But again, a review of the evidence in the light most favorable to Litton compels us to conclude that the jury could reasonably have inferred that AT&T opposed the development of certification standards in a

manner calculated to delay the day when *Carterfone's* pro-competitive mandate would become fully effective. Litton introduced evidence, and AT&T concedes in its brief, that AT&T "did not complete some of its 'homework assignments' on time" in connection with the PBX Advisory Committee's efforts to develop certification standards. AT&T Brief at 20. And, although AT&T had decided in March of 1973 that it would oppose certification standards, it continued to work with the Advisory Committee in accordance with an internal "Tactics Memorandum" which concluded that withdrawing from the committee would accelerate "decisions in favor of certification." This evidence is sufficient to support an inference that AT&T did what it could to delay and obfuscate the efforts undertaken by the FCC and other interested parties to develop certification standards. As a textbook example of a monopolist in control of an essential facility, *see United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), it is difficult to conclude that these efforts could not have amounted to an abuse of the administrative process. The result, to draw an obvious analogy to *California Motor Transport*, was that Litton and other terminal equipment competitors were barred from access to the telephone network system.

AT&T had no realistic hope that the FCC would approve the interface device; its own people thought that the device was a redundant "artificial barrier" to competition. It nevertheless consciously pursued a policy of delaying the time when the FCC would strike down the PCA requirement. It implemented this policy by making baseless claims relative to potential harms to the network while opposing certification standards in every way possible. AT&T argues that it actually wanted the FCC to

approve the interface device and reject certification standards, but as Professor Areeda points out

> [t]o be sure, [a competitor] would always be pleased to obtain a governmental decision against his rival. But where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so [is] a sham.

P. Areeda, *supra*, at 5. AT&T's conduct was not undertaken in the hope of influencing governmental action, but in the hope of delaying it.[39] *See Landmarks Holding Corp. v. Berman, supra*. As such, it amounted to the sort of abuse of the administrative process that falls within the *Noerr-Pennington* sham exception. The jury's determination to that effect is sustainable if the instructions were correct.

3. *The Trial Court's* Noerr-Pennington *Instructions*

AT&T challenges the *Noerr-Pennington* instructions on two grounds. First, AT&T claims that the instructions entitled "Opposition to Registration" and "First Amendment Protection and the Bad Faith Exception" had the effect when taken together of denying it any *Noerr-Pennington* defense because the jury could have premised its

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[39] Professor, now Circuit Judge, Bork has suggested that the antitrust law must develop standards to address the anticompetitive effects of litigation and administrative actions instituted solely to harass and injure a competitor's rivals. *See* R. Bork, The Antitrust Paradox 357 (1978). The need to ensure that the regulatory processes not be used to thwart competition seems all the more pressing where, as here, there is serious doubt regarding whether the process can function at all without the regulated entity's full cooperation. *See United States v. American Telephone & Telegraph Co.*, 524 F. Supp. at 1359 (former Chief of FCC's Common Carrier Bureau testified at trial that FCC may be "incapable of effectively regulating a company of AT&T's size, complexity, and power").

verdict merely on anticompetitive intent. Second, AT&T argues that the First Amendment values that *Noerr-Pennington* reflects require the use of a "clear and convincing" rather than a "preponderance" evidentiary standard.

AT&T's first point can be answered by reviewing the jury instructions, as we must, in their totality. *See, e.g.*, *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 362-63 (2d Cir. 1966). AT&T maintains that the instructions were flawed because they established a "good faith/bad faith" dichotomy that conditioned the availability of the *Noerr-Pennington* defense on good faith, and equated bad faith with anticompetitive intent. The instructions that AT&T objects to are set forth in the margin.[40] Because we must assume that the jury discharged its obligation to apply the law in accordance with the trial judge's instructions, our

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40 The court's charge on the issue of "Opposition to Registration"—before the *Noerr-Pennington* defense was mentioned—was as follows:

> You have also heard about Bell's opposition to proposals made before the FCC that the PCA tariffs be replaced by various programs of certifying or registering equipment with the FCC. The question for your decision is whether Bell's opposition was interposed in bad faith for the purpose of excluding competition or whether Bell took this position because it believed that the registration proposals being made were not in the public interest and would not provide sufficient protection to Bell System employees, customers and the telephone network.

AT&T Brief at 63. AT&T correctly argues that a "purpose of excluding competition" does not suffice to create antitrust liability. The charge went on to say:

> Many of these actions, if successful, might be harmful to a competitor. Nevertheless, the First Amendment guarantees that persons or corporations may participate in good faith efforts to influence the passage or enforcement of laws or government regulations or to influence public officials regardless of whether the results of the government action they seek would be harmful to competition.

Id. at 64. AT&T argues that the jury was not given a definition of "good faith," but "bad faith" had just been defined as meaning "for the purpose of excluding competition."

review is limited to whether the instructions misled the jury as to the applicable law. AT&T's brief fails to consider, as we must on review, that portion of the charge where the court explicated what it meant by good faith and bad faith. That portion follows:

> You are also instructed that petitioning an administrative agency such as the FCC or seeking review in the courts may result in delays because administrative or judicial procedures are often time consuming. Creating such delays does not constitute willful exercise of monopoly power as long as the petition or application to the courts is based on a good faith interest in influencing the agency or obtaining a court ruling.
>
> However, there is an exception to the general rule that efforts to influence public officials do not violate the antitrust laws, and that is the so-called sham or bad faith exception. If a campaign, ostensibly directed toward influencing government action, is a mere sham or artifice to cover what is essentially nothing more than an attempt to smother competition by a pattern of knowingly filing baseless claims or making misrepresentations to administrative agencies in a way designed to deprive competitors of meaningful access to those agencies, the First Amendment protections are lost and the Sherman Act applies.

To be sure, the contours of the sham exception are far from clear; the courts have themselves had difficulty defining the doctrine. *See* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. Chi. L. Rev. 80, 104 (1977). The instruction here apprised the

jury that "creating . . . delays" did not constitute an antitrust offense regardless of anticompetitive intent. While the instruction might have been more explicit as to the nature of bad faith, it accurately, if in general terms, tracked the Supreme Court's explication of the sham exception in *California Motor Transport*, and comported in its essentials with our discussion of the sham exception, *supra*. We cannot agree that the instructions were erroneous when viewed as a whole.

The trial court judge did not charge the jury that the sham exception had to be demonstrated by "clear and convincing" evidence. While AT&T cites libel, patent, and fraud cases in support of its argument, it points to no authority holding that the sham exception should be subject to the higher standard of clear and convincing evidence.[41] AT&T argues that the standard should be required in cases such as this to avoid a chilling effect on

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[41] The libel cases include *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) and *Yiamouyiannis v. Consumers Union of United States, Inc.*, 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980).

The fraud and civil perjury cases include: *Clark v. John Lamula Investors, Inc.*, 583 F.2d 594, 597 n.2, 600 (2d Cir. 1978) (securities fraud); *Geller v. Commissioner of Internal Revenue*, 556 F.2d 687, 690 (2d Cir. 1977) (income tax fraud); *McDonnell v. American Leduc Petroleums, Ltd.*, 456 F.2d 1170, 1176 (2d Cir. 1972) (fraud under New York and California law); *Barr Rubber Products Co. v. Sun Rubber Co.*, 425 F.2d 1114, 1120-21 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970) (civil perjury). *See also* 86 Harv. L. Rev., *supra* note 37, at 724-25 (recommending clear and convincing evidence standard for sham exception claims).

The patent case is *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.*, 450 F.2d 769, 772 (9th Cir. 1971), *cert. denied*, 408 U.S. 929 (1972); *see also Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 996 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) (allegation in antitrust case that patentee's infringement suit prosecuted with knowledge of patent invalidity).

We take due note that the charge in *MCI Communications Corp. v. American Tel. & Tel. Co.*, Nos. 80-2171, 80-2288 (7th Cir., Jan. 12, 1983), was put in terms of "clear and convincing" proof.

speech. We recognize that the standard of proof may well be a substantive element of a claim or defense, *see, e.g.*, *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943), but by requiring a plaintiff to prove that a defendant's conduct was a sham, the Supreme Court has already struck a rough balance between the competing First Amendment and antitrust interests. And as the Court pointed out in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), the antitrust laws are as important to the preservation of economic freedom and the free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. We see no reason to impose any higher burden of proof on the antitrust plaintiff asserting sham than would ordinarily be applicable in any civil issue. *See Herman & MacLean v. Huddleston*, 51 U.S.L.W. 4099, 4103 (U.S. Jan. 24, 1983) (preponderance of the evidence standard applicable in securities fraud action under Section 10(b), noting that the interests of defendants in such cases do not differ from the interests of defendants "sued for violations of . . . antitrust . . . laws, for which proof by a preponderance of the evidence suffices").

D. *Sufficiency of Proof*

Our discussion above indicates that we believe there was ample evidence to justify the jury's findings regarding the filing of the interface tariff and opposition to certification. We also conclude, after reviewing the evidence in the light most favorable to Litton, that the jury could reasonably have found that AT&T's conduct in connection with the supply and installation of PCAs, the sale of inside wiring, and "cut-over" from AT&T to Litton equipment was predatory.

AT&T argues that Litton's evidence as to delays in the supply and installation of PCAs consisted of no more than "some vendor and customer complaints." But Litton's evidence, some of which we summarize here, tended to show that PCA shortages were chronic, that they were intentionally maintained or "contrived," and that AT&T misled the FCC with respect to the magnitude of this problem. For example, Litton introduced a 1970 memorandum written by an AT&T vice president stating that AT&T had

> repeatedly been contacted by the FCC staff and outside attorneys with respect to connecting arrangements not being available. So far we have been able to placate the situations with explanations of "a possible misunderstanding or only a temporary delay" and assurances that no serious supply problems exist—followed of course by a four alarm fire approach to meet the particular demand. It is doubtful that this approach will continue to avoid formal action of some sort by the FCC.

The shortages nevertheless continued, as evidenced by complaints received by AT&T from its own local affiliates.

In June of 1972, for example, Illinois Bell, in a telex to AT&T headquarters in New York, explained that because "so many defective units [KS 20721 couplers] have been received we have difficulty in providing this interface unit and meeting customer due dates." And, in October of 1972, an Ohio Bell executive stated in a letter to Ohio Bell's Assistant Vice President that "[A]n increasing number of vendors have complained bitterly because of our failure to supply this equipment. In many recent cases we have been unable to even quote any kind of a realistic

delivery date." This same letter posed a question that no doubt puzzled the jury:

> How can we continue to insist on the use of an interconnect device when we are unable to provide such a device? It seems to me that these problems must be given the highest level of attention at Ohio Bell, Western Electric and A. T. & T. before we end up with a large-scale customer revolt and potential legal action for restraint of trade.

AT&T's response to this letter confirmed the existence of a "critical supply situation . . . throughout the system," which resulted in 76% of customers' PCA requests in New England being "missed" by an average of 10 days, although AT&T had an average lead-time of 24 days to fill the requests. The shortages were discussed at a June 14, 1973 meeting of the Bell Interconnecting Equipment Coordinating Committee and the minutes of the meeting disclose recognition of "some very serious service complaints" and "extreme service problems" with certain PCA hardware.

We believe that the evidence thus revealed more than isolated "customer and vendor" complaints; Litton's evidence tended to show that AT&T was aware of PCA supply problems and failed to take the steps necessary to correct them. In view of AT&T's own policy of requiring interconnection only through a PCA, we do not think it was unreasonable for the jury to conclude that these shortages were orchestrated to frustrate Litton and other terminal equipment competitors.

The jury could also reasonably have inferred from the evidence introduced by Litton that some of AT&T's practices in connection with "inside wiring"—i.e., wiring owned by AT&T but located on or in a customer's

premises—were anticompetitive. AT&T professed its willingness to sell the wiring if a customer wanted to "cut over" from AT&T to a competitor's equipment, but Litton's evidence tended to show, first, that AT&T would often negotiate in bad faith by quoting unreasonably high prices for the wiring and, second, that in "many, many instances" AT&T chopped this wiring off flush with a customer's walls. Indeed, a South Central Bell general manager noted at one point that the practice of destroying inside wiring was "unreasonable and could very well be interpreted as . . . vindictive." That is the conclusion the jury reached and we see no reason to overturn it.[42]

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[42] AT&T argues that the only evidence was that on three isolated occasions one operating company, Southwestern Bell, chose not to sell its cable to Litton but that even as to these instances there was no showing of bad faith on Southwestern Bell's part; again the evidence is argued to be insufficient under *Berkey*. But the former Litton BTS Vice President of Operations said:

> In installations, we would find that when a customer was having the Bell system removed, the Bell folks would just come in like with an axe and just chop up the multipin connector wiring at walls. Gosh, darndest thing I ever saw. Just couldn't believe people would do that. That particular thing we tended to get over over a period of time and we ended up up [sic] some coordination meetings to try get the Bell folks to leave the premises on a reasonable basis as opposed to one of appearing to be mad.

He added that:

> A. It wasn't one customer. It was many many installations where that would occur and I just do not remember.
>
> Q. Did you ever observe that situation?
>
> A. Yes. Because I couldn't believe it, so I went and looked myself.
>
> Q. How often did you do that?
>
> A. Twice.
>
> . . . .
>
> Q. When you referred to damage, is it the same damage at each customer's premises?
>
> A. The two that I observed was the same damage and that was just going along and cutting the wires at the walls.
>
> Q. When you say cutting the wires at the walls, can you be a bit more specific about the nature of the damage?

Finally, AT&T argues that Litton failed to introduce sufficient evidence to justify the jury's conclusion that AT&T's delay in making "cutovers"—the final step involved in switching from AT&T to non-AT&T equipment—was anticompetitive. The record indicates, however, that Litton introduced, *inter alia*, testimony from representatives of various terminal equipment competitors to the effect that cutover delays frustrated their attempts to install equipment on schedule. The jury could have concluded from this and other evidence of intransigent cutover practices that AT&T's conduct injured Litton and other terminal equipment competitors.[43]

AT&T takes the position that these practices amounted to no more than *de minimis* injury under *Berkey Photo Inc.*, 603 F.2d at 288-89; *see also Federal Prescription Service Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 268-71 (D.C. Cir. 1981), *cert. denied*, 50 U.S.L.W. 3587 (U. S. Jan. 25, 1982). We disagree. AT&T's *seriatim* attacks upon the jury's findings invite us to approach Litton's proof as if this case involved "completely sepa-

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A. Yes. There are pairs of wires that are grouped together in cables and are wrapped in some plastic covering that come to a key phone or single phone or whatever, different size connectors. They would be chopped right off at the wall so you had no capability of coming to those wires with your connectors and so forth, even though you might be purchasing a cable from them.

[43] AT&T points to *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 94 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1438 (1982), where we set aside a jury verdict because the plaintiff "introduce[d] [no] evidence whatsoever" that an AT&T affiliate provided poor service to the plaintiff's customers *after* the purchase and installation of the plaintiff's terminal equipment. But Litton's claim is that shortages, missed cutover dates, etc., prevented it both from satisfying existing customers and luring prospective customers because it could not "cutover" on schedule. Unlike *Northeastern*, there is evidence in this case to support Litton's claim that the problems associated with delay were real.

rate and unrelated lawsuits . . . tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.*, 370 U.S. at 698-99. But on the basis of any one of these practices—all of which were supported by sufficient evidence—the jury could have reasonably concluded that Litton suffered competitive injury.[44] The jury's finding that this conduct was predatory, i.e., undertaken with an anticompetitive intent in an attempt to injure Litton, is all the more reasonable given the synergistic nature of these practices in relation to Litton's primary claim that it was excluded from the terminal equipment market. AT&T argues at length that Litton failed to prove that the shortages, delays, and inside wiring episodes were deliberate, but this ignores the fact that "[c]ircumstances in which intent can be inferred other than from conduct which is itself exclusionary will no doubt be rare. . . . [T]he relationship between intent and conduct is intimate: thought enlivens the deed; it can also be inferred from the deed." L. Sullivan, Antitrust § 39, at 105 (1977).

E. *Evidentiary Rulings*

AT&T challenges several of the trial court's rulings on the admissibility of evidence, arguing that the exclusion or limited admission of some evidence prevented it from proving that Litton chose to leave or was driven from the terminal equipment market because of adverse publicity resulting from a bribery scandal and other corrupt practices. AT&T also maintains that the trial court judge erred

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[44] *See Northeastern Telephone Co.*, 651 F.2d at 95 n.28, *citing California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979) (holding that no synergistic effect arises from individual allegedly anticompetitive practices where proof in numerous critical aspects is utterly lacking).

in admitting some evidence that was unduly prejudicial to AT&T while excluding similar evidence favorable to AT&T on the issue of the reasonableness of the PCA requirement. The cumulative effect of these errors, AT&T argues, requires reversal. We deal with these arguments in the order advanced by AT&T.

1. *Exclusion of the Roberts Notes*

In 1973 Litton conducted an internal investigation of possible employee misconduct related to the sale of Litton terminal equipment. A Litton attorney, Norman Roberts, made notes of his interviews with various Litton employees during the course of this investigation. AT&T argues that these notes constitute a "devastating admissio[n]" against Litton insofar as they reveal that Litton employees gave potential customers "calculators, girls and anything else" to make a sale, that "sales morale and performance [were] . . . way down," and that "skimming" and "funny deals" were commonplace. AT&T claims that the notes were admissible under Federal Rule of Evidence 801(d)(2)(D), which excludes from hearsay "admission[s] by [a] party-opponent" in the form of statements made by a party's "agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

AT&T's claim that Roberts' notes—which summarized what various Litton employees recounted to him about wrongdoing on the part of other Litton employees—were admissible because the multiple levels of hearsay were all made in the course and scope of employment, is not persuasive. *See Northern Oil Co. v. Socony Mobil Oil Co.*, 347 F.2d 81, 85 (2d Cir. 1965). The fact that Roberts summarized what some Litton employees said about other employees in the course of his investigation does

not bring the events he summarized within the "scope of his agency or employment" under 801(d)(2)(D). *See* J. Weinstein, 4 Evidence 801-164 (1981) ("Gossip does not become reliable merely because it is heard in an office rather than a home.") The hearsay which he summarized may well have been inadmissible even if testified to by the employees interviewed. *See Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 80 n.3 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981). In any event, AT&T made no attempt at trial to lay the necessary foundation for the admission of the notes under 801(d)(2)(D) or any other rule, and simply argues here that the terms of 801(d)(2)(D) were satisfied. We decline to hold that the trial court committed reversible error by failing to admit the notes, either for their truth or otherwise, particularly in view of the fact that AT&T could have overcome the trial court's objections by examining Roberts himself or those Litton employees he interviewed. *See Litton Systems, Inc. v. . T&T Co.*, 91 F.R.D. 574, 578 (S.D.N.Y. 1981). We note that while Judge Kearse disagrees with our hearsay analysis, she agrees that there was no reversible error.

2. *The San Mateo Bribery Incident*

In November of 1973 four of Litton's executives in its terminal equipment division were indicted for paying bribes to an employee of the state college system in San Mateo, California. The trial court permitted AT&T to prove that the officials were indicted and subsequently discharged, but excluded evidence of the bribery under Federal Rule of Evidence 403 because of its emotional and prejudicial content. We note that the trial court at one point indicated that it would consider admitting the bribery evidence if AT&T would allow Litton to offer

proof that AT&T had bribed public officials; AT&T declined the offer. Plainly the trial court did not abuse its discretion in excluding this evidence.

3. *The Mellor Memorandum*

AT&T argues that the trial court erred in not admitting for its truth a memorandum taken by James Mellor, a Litton senior vice-president, that summarized Mellor's conversation with Leonard Mende, one of the Litton BTS (Business Telephone Systems) executives who had been discharged as a result of the San Mateo incident. Mellor's notes of this conversation indicate that he told the discharged executive that the San Mateo scandal had "screwed up a very promising business activity." The trial court admitted the memorandum for the purpose of showing what Mellor had said to Mende, but refused to admit the memorandum for its truth—i.e., as proof that the San Mateo scandal caused Litton to leave the terminal equipment market. AT&T makes the same argument under 801(d)(2)(D) with respect to this evidence that it makes with respect to the Roberts notes, and the reservations we expressed earlier are applicable here. In any event, Mellor himself testified that the contents of the memorandum accurately summarized what he said, and the memorandum was examined by the jury and quoted in AT&T's opening and closing arguments. We therefore cannot see how AT&T was prejudiced by the trial court's decision not to admit the memorandum for its truth.

4. *The Selph Deposition*

The trial court granted AT&T special leave to take the deposition of a Litton employee who had been discharged in connection with the San Mateo incident. In granting

AT&T's request to take this deposition, the trial court limited discovery to those matters made relevant as a result of Litton's eleventh-hour disclosure of the Roberts notes. AT&T argues that some of Selph's deposition testimony that the PCA device had no effect on Litton's sales should have been admitted, particularly in view of the fact that the trial court allowed Litton to introduce deposition testimony outside the scope of a similar special leave. We attribute this difference in treatment to a difference in the content of the testimony. In granting special leave to take the Selph deposition the trial court imposed certain limitations that AT&T ignored; the discretion involved in reopening discovery could be cast aside if parties could ignore such limitations with impunity. In any event, the cumulative nature of the evidence excluded belies any claim that AT&T was prejudiced.

5. *Admission of Hoxie's Testimony*

AT&T contrasts the trial court's exclusion or limited admission of all of the above evidence with the admission of testimony by Lowell Hoxie, a former Litton vice president in charge of the terminal equipment division's marketing and administration group. Hoxie testified that problems associated with defective PCAs, short supply, and missed delivery dates imposed "incredible cost[s]" on Litton, the effects of which were "devastating" to Litton's efforts to establish itself in the terminal equipment market. The trial court rejected the argument that this testimony was inadmissible as hearsay because, although Hoxie testified in part from recollection of oral reports made by subordinates, much of his testimony was based on first hand knowledge and observation or reports made in the ordinary course of business. The testimony was therefore admitted under Federal Rule of Evidence

803(24), which provides for the admission of hearsay statements not specifically enumerated in Rule 803. The trial court found that the testimony had sufficient "circumstantial guarantees of trustworthiness," Fed. R. Evid. 803(24), to justify its admission because the reports, even if oral, were made in the ordinary course of business. The court also explained that it was doing so to avoid the "expensive and very inefficient" alternative of "call[ing] enough witnesses to furnish non-hearsay substantiation of [the] summary" offered by Hoxie. Thus, although the trustworthiness of recollections of the sort Hoxie's testimony contained is open to question, *see Bowman v. Kaufman*, 387 F.2d 582, 586-87 (2d Cir. 1967), the potential hearsay taint of Hoxie's testimony is not sufficient to justify reversal.

6. *Evidence Relating to the Reasonableness of the Interface Tariffs and AT&T's Opposition to Certification*

AT&T objects to the trial court's treatment of three other items of evidence, all of which were offered by either AT&T or Litton as bearing on the reasonableness of the interface tariffs or AT&T's opposition to certification standards. The first ruling to which AT&T takes exception is the admission of various FCC decisions that described AT&T's tariffs as "unreasonable," "illegal," "discriminatory," or "unlawful." Although the trial court excised the words "unlawful" and "illegal" at AT&T's request, it refused to remove portions stating, for example, that the interface tariff was "unnecessarily restrictive" and an "unjust and unreasonable discrimination." According to AT&T, the different meanings of "reasonableness" under the Sherman Act and the Communications Act justified its request to have these words

removed and the jury was unavoidably prejudiced by the trial court's failure to do so.

We agree with Litton that these decisions were central both to Litton's claim that the PCA device was unnecessary and Litton's rebuttal of AT&T's defense that the interface tariff was an attempt to comply with previous FCC rulings. The order excluding all portions of the FCC rulings stating that the tariffs were "unlawful" or "illegal" gave AT&T all to which it was entitled because the FCC continually held after *Hush-A-Phone* that AT&T's practices were not necessary to protect the telephone system. The findings thus directly undercut the predicate of AT&T's argument that the PCA requirement was "reasonable" under the antitrust laws because it was an attempt to follow regulatory policy. The findings were properly admitted under Federal Rule of Evidence 803(8)(C) as factual findings resulting from an investigation made pursuant to authority granted by law.[45] Moreover, the court's charge made it clear to the jury that the term "reasonable" as used in the rulings did not necessarily signify the same thing as "reasonableness" under the antitrust laws and were therefore not binding.

AT&T's second objection contrasts the admission of the above FCC decisions with the trial court's exclusion

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[45] AT&T cites to our decision in *City of New York v. Pullman Inc.*, 662 F.2d 910 (2d Cir. 1981) as support for the proposition that a finding made by a government agency for one purpose should be excluded from other proceedings considering the same or similar facts because of the undue weight a jury might accord such findings. In *City of New York*, however, we affirmed the trial court's exclusion of an interim staff report of a government agency because the report was "[b]y its own terms, . . . not the final report or finding of a government agency within the meaning of [Fed. R. Evid. 803(8)(C)]." *Id.* at 914. In the alternative, we noted that the trial court judge had not abused his discretion in deciding that admission of the report was inadvisable under Fed. R. Evid. 403. *Id.* at 915. Here, of course, there is no question that the FCC decisions are within the scope of 803(8)(C).

of a 1969 New York State Public Service Commission decision upholding the interface as a reasonable means of protecting the network against harm. The trial court excluded the 1969 decision upon its own motion on the grounds that the monthly charge for the interface considered there was fifty cents, as opposed to the average monthly charge of over six dollars for the interface device challenged in this case. AT&T argues that it was deprived of an opportunity to prove to the jury that AT&T was not alone in its belief that the interface device was absolutely necessary to protect the telephone system from harm. *Cf. Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 615 F.2d 1372, 1390 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980).

We view this evidence as arguably probative of AT&T's position, and find it difficult to justify the exclusion of this decision in light of the admission of the various FCC rulings. Although there is a considerable difference in cost between the two interface devices, this goes more to the weight to be accorded the evidence than its admissibility; any confusion or prejudice probably could have been avoided by appropriate instructions. But we are also mindful of the fact that this was a complicated and extensive trial, involving four and one-half years of pretrial proceedings, five months of trial, more than 18,000 pages of testimony and 945 exhibits. If a jury trial of this size and complexity is to be had at all, the trial court must have the discretion to limit the evidence at some point. We cannot find that this exclusion amounted to prejudicial error.

AT&T's final objection to the trial court's evidentiary rulings involves a 1976 report prepared by a former member of the PBX Advisory Committee. The report indicated, *inter alia*, that AT&T's competitors viewed

some of its practices in connection with the PCA requirement and general pricing scheme as anticompetitive. The trial court recognized that the report was hearsay, and therefore refused to admit it for its truth, but admitted the evidence for the limited purpose of showing what was reported to AT&T. But by 1976 Litton had left the terminal equipment market and the PBX Advisory Committee had completed its work. We therefore cannot see how the report bears on the only issue for which it could have been relevant, viz., whether AT&T knew that the Committee felt that AT&T's opposition to certification was in bad faith. Thus the ruling was erroneous, and the possible prejudicial effect—the report stated that AT&T's competitors felt that "Bell pricing has virtually killed the Interconnect market"—is troubling. We view the trial court's ruling as unfortunate, but do not believe that this ruling, or any of the other rulings, denied AT&T a fair trial even when considered collectively. Fed. R. Evid. 103(a); Fed. R. Civ. P. 61. *See, e.g., McKinnon v. Skil Corp.*, 638 F.2d 270, 276 (1st Cir. 1981) (ruling, if erroneous, harmless as not affecting "substantial rights").

F. *The Verdict for Litton as Customer*

In addition to the injuries it sustained as AT&T's competitor, Litton alleged that it was entitled to recover $491,778.57 spent for the installation and rental of AT&T interfaces on its own, internal telephone equipment for the eleven year period running from January 1, 1969 to the end of 1979. The jury awarded Litton exactly six-elevenths of this amount, $268,243, possibly reflected in the jury's initial determination that AT&T opposed certification in bad faith from and after 1973 until the end of 1978. We do not, for reasons stated in our discussion of Litton's claims as a competitor, believe that this verdict

should be overturned on *Noerr-Pennington* grounds. But AT&T offers us three other reasons—one factual and two legal—to overturn the verdict. We reject each of them in turn.

AT&T's first argument goes to the sufficiency of the evidence supporting the jury's verdict.[46] Specifically, AT&T complains that the evidence was insufficient because Litton failed to itemize its expenses for the charges on an annual basis. AT&T waived this objection by failing to challenge the figures or request that the witness presenting them break them down. Fed. R. Civ. P. 46. Taking another tack, AT&T argues that Litton should have mitigated its damages by removing the interface devices as soon as the tariff requiring them was invalidated.[47] Aside from being inconsistent with its earlier argument that the jury apportioned the damages without evidentiary support, this argument cannot succeed because Litton's failure to remove the devices is readily explicable on the grounds that the expense of removal—

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[46] AT&T argues that the jury had no rational basis for apportioning damages as it did because "the vast majority" of PCA charges could have occurred in years the jury thought it had excluded from consideration. Brief at 125 & n.117. This could be correct but in the absence of a breakdown we or the jury might just as easily have assumed that the vast majority of charges could have occurred in the six years 1973-78 which AT&T says were the years utilized by the jury. In any event in light of the jury's later finding that the PCA tariffs were filed in bad faith the ultimate award seems to err on the low side, if any. We assume that AT&T does not want a retrial limited to this issue.

[47] An antitrust plaintiff has a duty to mitigate damages. *See Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 398-99 (2d Cir. 1980); *Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1360 (2d Cir. 1976). But if AT&T is correct that the jury's award reflects a six-year period running only from the beginning of 1973 until the end of 1978, when the FCC order setting aside the last protective circuitry requirement became final, the damage award was fair. Moreover, failing to mitigate was an affirmative defense which AT&T omitted either to plead or prove.

some of the devices were permanently wired into the equipment—might have exceeded the savings resulting from removal.

AT&T's second argument against the verdict for Litton as customer relies on the "filed tariff" doctrine announced in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922). There the Supreme Court held that a shipper could not recover under the antitrust laws for injuries sustained as a result of allegedly unreasonable rates that had been filed with and approved by the Interstate Commerce Commission. We have recently held, however, that the *Keogh* doctrine is inapplicable to ultimately "disapproved tariffs . . . when . . . the regulatory agency expressly refuses to commit itself pending investigation." *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981). In reaching this conclusion we relied, in part, upon our decision in *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d at 83-84, which held that a tariff filing does not immunize a regulated entity from antitrust scrutiny, and in part on the lower court's opinion in this case, *Litton Systems, Inc v. American Telephone & Telegraph Co.*, 487 F. Supp. 942, 951 (S.D.N.Y. 1980). *See City of Groton*, *supra*, at 931. Unless otherwise advised by higher authority, we do not intend to disavow *City of Groton* or the import of our discussion on the interplay between regulation and antitrust immunity in *Northeastern Telephone Co.*

This case can be distinguished from *Keogh* and decisions holding the filed rate doctrine applicable, *see McLeran v. El Paso Natural Gas Co.*, 357 F. Supp. 329, 331-32 (S.D. Tex. 1972), *aff'd without opinion*, 491 F.2d 1405 (5th Cir. 1974); *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 769-771 (D. Del. 1979),

because the issue here is not the reasonableness of the interface tariff rate as compared to some other rate that might have been charged, but instead whether the PCA requirement itself was reasonable, i.e., whether there should have been any charge at all. We thus believe that the concerns expressed in *Keogh* involving the possible inconsistency between the operation of the antitrust laws and an independent regulatory scheme designed to fix reasonable rates under a statute are not implicated here. We therefore affirm the lower court's holding with respect to the inapplicability of the *Keogh* doctrine.

AT&T's third and final argument goes to Litton's standing to seek damages as a customer. Essentially, AT&T argues that when Litton donned a customer's hat it placed itself outside the "target area" that delineates one plaintiff from another in terms of standing to sue. The "target area" doctrine was first enunciated in *Billy Baxter, Inc. v. Coca Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971), where we stated that

> [A] plaintiff must allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal act. . . . These terms do not provide talismanic guides to decision but they do indicate the need to examine the form of violation alleged and the nature of its effect on a plaintiff's own business activities.

Customers are not *per se* outside the target area. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979); *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313-15 (1978); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968);

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948). The test is ultimately one of directness. We have thus looked to whether the conspiracy was "aimed" at a particular entity in the area of the economy threatened by anticompetitive conduct, *see Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972), and to whether the injury in question was central to the attainment of the anticompetitive objective rather than a mere incident thereto, *see Schwimmer v. Sony Corp.*, 637 F.2d 41, 48-49 (2d Cir. 1980).

The Supreme Court has recently rejected an argument similar to the one AT&T makes here in connection with Section 4 of the Clayton Act. In *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723, 4726-27 (U.S. June 21, 1982) the Court recognized standing of a health insurance subscriber who was denied reimbursement for psychological therapy under a policy term providing reimbursement for such services only if they were rendered by psychotherapists. The petitioners in *McCready* adverted to the "target area" doctrine, citing our decision in *Calderone Enterprises, supra.* In holding that the petitioner's injury was not too remote the Court pointed out that the "target area" test does not "imply that it must have been the purpose of the [defendants] to injure the particular individual claiming damages," 50 U.S.L.W. at 4726 n.15 (citing *Schwimmer, supra*).

In this case, as in *McCready*, it avails AT&T little to argue that customers are outside the target area because the anticompetitive effect, if any, of the interface tariff was aimed at terminal equipment manufacturers rather than customers. While an intent to injure a specific entity may well be sufficient to satisfy the target area test, our

emphasis in *Schwimmer* on whether the injury was central to the attainment of the anticompetitive objective suggests that this is not always necessary. In this case, the jury found that AT&T imposed the interface tariff in order to maintain its monopoly position in the terminal equipment market. The tariff was "aimed" in the first instance at AT&T's customers in the sense that it applied to every user that chose to interconnect non-AT&T equipment. The tariff was perhaps the only way, and it was certainly the most efficient way, that AT&T could burden competitors seeking to establish themselves in the terminal equipment market. Thus, the injury to Litton as a customer was not remote even if injury to customers was not AT&T's first objective.

G. *The Damage Study*

AT&T argues that the damage award for Litton as a competitor must be overturned because it was based on a study that incorporated assumptions that were both unsubstantiated in the record and contrary to some of the jury's findings regarding the legality of certain AT&T practices. Litton's damage study, the so-called "Lost Profits Study," was prepared by Richard Hexter, whose substantial qualifications we set forth in the margin.[48] The two year study used a variety of sources to generate sales,

[48] Hexter received his MBA from Harvard University and has taught graduate courses in finance and management at Columbia and Yale Universities. Prior to forming his own firm in 1975, Hexter worked for 15 years with Donaldson, Lufkin & Jenrette, an investment banking firm, where he served first as an industry analyst and later as the head of that firm's corporate financing, investment banking and venture capital division. Hexter was also familiar with the telecommunications industry as a result of his service as a board member of Arcata National Corporation and his study of Litton while he was with Donaldson, Lufkin & Jenrette.

profit, and market share data for Litton's position in the interconnection market from 1972 until 1990.

We note at the outset that the study was conservative in that it assumed that Litton would forego short term profits to achieve larger market shares and profits from 1979 on. The jury awarded Litton estimated profits up to and including 1978, in keeping with the trial court's instruction that Litton had an obligation to reenter the market when the interface tariff was finally set aside in 1978. We also note preliminarily, in order to provide some perspective on the magnitude of the telephone terminal equipment market and the jury's award, that Litton sustained an out of pocket loss of some $53 million before it left the market. Although we do not know AT&T's profits, its revenues from the sale of terminal equipment during this period was at one point in excess of $1.2 billion. By AT&T's own admission, Litton was the "number one formidable adversary" in this market and Hexter testified that if Litton had obtained a market share of even 6.9%, its 1982 profits alone would have been $37 million. Hexter's Lost Profits Study was typical of its genre in that it was based on an estimate of what Litton's experience would have been in the absence of the interface tariff (the "but for" world) as opposed to Litton's actual experience (the "real world").

As the only evidence introduced in support of Litton's damage claim as a competitor, the Hexter study conveniently provides a single target for the two salvos AT&T fires. The first is that the record fails to support certain assumptions upon which the study is based. The second is that the study incorporated assumptions regarding the absence of pricing and other practices that the jury either did not consider or determined not violative of the antitrust laws. We reject AT&T's argument that Litton's

damage study was based on unsupported assumptions or practices held lawful by the jury and affirm the jury's award.

1. *Support for the Hexter Study in the Record.*

AT&T argues that Hexter's projections—the heart of the Lost Profits Study—were based on a host of mutually independent assumptions which find no support in the record. The argument is that the Lost Profits Study should therefore not have been admitted and that the verdict must be set aside. *See Yentsch v. Texaco, Inc.*, 630 F.2d 46, 59 n.19 (2d Cir. 1980); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912-13 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). AT&T specifically attacks six "assumptions" of the Hexter study.

The first of these relates to Hexter's assumption that certification standards would have been adopted by early 1973 "but for" AT&T's opposition. AT&T argues that because various other groups also were opposed to certification, there is no evidence that AT&T's conduct was responsible for the FCC's failure to implement a certification program any earlier than it did. But Litton demonstrated that various AT&T executives admitted that they could have filed standards within a year of the *Carterfone* decision. This supports the premise, as not unreasonable or contrary to common sense, *see Auto West, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 566-67 (2d Cir. 1970), that if AT&T had behaved legally there would have been no interface device after early 1973.[49] The validity of this

[49] AT&T suggests that because other groups also opposed certification standards, Litton must prove a negative—*i.e.*, that this opposition had nothing to do with Litton's injury—in order to recover. Although Litton was required to prove a "causal connection" between its injury and AT&T's illegal conduct, it was sufficient to demonstrate that AT&T's conduct was a substantial or materially contributing factor.

premise is the very heart of the jury's verdict that AT&T filed the interface tariff and opposed certification in bad faith.

The second assumption AT&T challenges concerns the amount of money Litton would have invested in research and development in Hexter's "but for" world. As support, AT&T points to the Business Opportunity Plan Litton prepared before it entered the market. The plan called for an investment of $1,452,000 in research and development from 1972 to 1976, but Hexter assumed that Litton would have invested $14,828,000 in the same period. But of course R & D does not immediately bear fruit; by making a higher estimate of Litton's investment than was contemplated in the Business Opportunity Plan the effect was to *decrease* profits for Litton's early years in the terminal equipment market.[50] Because the jury only awarded damages for lost profits in the years from 1972 to 1978, to the extent that Hexter's study might have overestimated R & D investment, Litton rather than AT&T was disadvantaged. In any event, AT&T's reference to the Business Opportunity Plan only substitutes one set of assumptions for another. In fact, there was evidence in the record from the author of the Business Opportunity Plan that Litton had intended from the beginning to spend more on R & D than the plan projected. There was also testimony to the effect that Litton was ready to invest whatever was needed to make

See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962).

[50] Indeed, under the profit scheme in Hexter's model, Litton sustained *losses* in 1972 and 1973. We also note that Litton introduced evidence showing that its early performance in the terminal equipment market exceeded the projections contained in the Business Opportunity Plan and that R & D expenditures were increased accordingly.

the business succeed. The AT&T argument is thus both irrelevant and mistaken.

AT&T's third argument is that Hexter's assumptions about the size of the total terminal equipment market and Litton's share of that market were not supported by the record. But we note that damages in antitrust cases "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), thus bringing the elasticity of *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931), into play. *See also Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). Accordingly, "where there is a basis on which a jury can reasonably infer significant antitrust injury, [the court] should be very hesitant before determining that damages cannot be awarded." *Berkey Photo, Inc.*, 603 F.2d at 304. Hexter's estimates were based upon a two year analysis of industry data available from Litton, AT&T, and public sources, and a review of more than thirty terminal equipment studies. His study projected that by 1978 AT&T would still have 79 percent of the terminal equipment market with the remaining 21 percent shared by all non-AT&T competitors. This estimate was conservative as compared to a study done by General Electric, which estimated that by as early as 1975 competitors would divide 30 percent of the market. Hexter's estimate of Litton's share of the total non-AT&T terminal market was also conservative; his estimates never exceeded 14.5 percent when in fact Litton's actual share before it left the terminal equipment market was at one point between 23 and 25 percent.

AT&T also complains about Hexter's treatment of Litton's bad debt costs. The argument is that Hexter ignored Litton's actual experience and postulated these

costs on the basis of a composite profile based on six well-run, thriving companies in high technology industries. For the limited time Litton sold and leased equipment, its bad debts amounted to almost 12 percent of its sales, while Hexter's model assumed that they would amount to less than 2 percent. According to Hexter's testimony, however, these companies were the six most comparable; three of them were actually in the terminal equipment business. We believe that Hexter's decision to use these estimated bad debt figures was based on the plausible assumption that Litton's actual experience in the start-up phase of its business was not representative of what those costs would be in later years.[51] We note in any event that Hexter's estimates of Litton's profits for the 1972 to 1976 period averaged less than 1 percent of sales, and the estimated profits of only 6.7 percent of sales for 1977 and 1978, was about half of AT&T's profits on its overall sales. We think that AT&T's argument as to Hexter's treatment of this single cost factor goes only to the weight of the evidence and does not compel rejection of the damage study or overturning the verdict. *Greene v. General Foods Corp.*, 517 F.2d 635, 665 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976).

The fifth Hexter assumption that AT&T challenges is that there would be "tough but equal" price competition and that Litton and other terminal equipment companies "would be able to compete profitably against whatever Bell tariffs were filed." AT&T argues that it had an

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[51] That AT&T's objections go to the weight and not the validity of the evidence used in the study seems plain. From the more than one hundred cost, expense, and other factors Hexter used in his study, AT&T attacks one figure—bad debts as a percentage of sales—to challenge Hexter's treatment of costs. AT&T's argument that Hexter's model should have somehow reflected the fact that 80 per cent of all new businesses are unsuccessful is frivolous.

inherent pricing advantage and that therefore neither Litton nor any other competitor could compete equally. This court has, of course, emphasized that a monopolist may lawfully take advantage of benefits deriving from its size or integration, *see Berkey Photo, Inc.*, 603 F.2d at 276, but AT&T has completely mischaracterized Hexter's assumption. Hexter's assumption concerning "tough but equal competition between the products and the people in the field" related not only to pricing, but included "price and features." His assumption was that "the companies would compete on their ability to sell, properly install and service the equipment."

The assumption that Litton would have been able to compete successfully was borne out by Litton's initial success in the terminal equipment market and evidence tending to indicate that AT&T itself thought that some of Litton's products possessed desirable features that AT&T's equipment did not. Moreover, Hexter testified at trial that his assumptions as to Litton's ability to meet AT&T's competition in the non-price category of product capabilities were in fact conservative insofar as he assumed only that Litton would stay abreast of the competition after it had established a position in the market.

The sixth and final assumption AT&T challenges is Hexter's inclusion of lost profits attributable to Litton's leasing operation, Litton Industries Credit Corporation (LICC). AT&T argues that the only commodity essential to an equipment leasing business is money and that Litton's leasing subsidiary was therefore free to lease any other equipment—telephone terminal equipment or otherwise—that it could purchase. But in the real world—for the limited time that Litton was in it—Litton did lease as well as sell its equipment and the money that LICC used to purchase the equipment from Litton BTS was

obtained by financing. Litton introduced evidence to support the proposition that the leasing operation was essential to its market efforts because many customers preferred a leasing arrangement to outright purchase. AT&T's argument that Litton could have leased any other commodity puts the cart before the horse; Litton operated the leasing subsidiary to sell telephone equipment, and not *vice versa*. AT&T's contention that Litton should have leased another product is equivalent to saying that an antitrust plaintiff's recovery of lost profits is limited by the highest alternative return that a plaintiff could have secured in another line of business entirely. The leasing operation was part of Litton's terminal equipment business and whatever profits Litton's leasing operation lost as a result of AT&T's conduct are therefore properly included in the measure of damages.

In short, the Hexter study is supported by the record and not based on assumptions as to evidence not in the record. The Hexter study is not rendered inadmissible because AT&T would have calculated the damages in a different manner or used other figures. *See, e.g., Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 843 (7th Cir. 1978); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1207 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Under *Story Parchment*, *Bigelow v. RKO Radio Pictures*, and *Zenith Radio Corp.*, the verdict must be sustained. *Cf. Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 272 (2d Cir. 1959).

2. *Litton's Damage Study and AT&T Conduct Found Lawful: Causation.*

AT&T argues that the Hexter Lost Profits Study assumed the absence of AT&T practices that the jury either did not consider or did not find unlawful, e.g., pricing practices, disparaging advertising, and copying competitors' products. The argument, stated more simply, is that Hexter could not separate the lost profits related to lawful activity from the lost profits related to the unlawful interface and practices associated therewith. AT&T correctly points out that courts have held that damage studies are inadequate when only some of the conduct complained of is found to be wrongful and the damage study cannot be disaggregated. *E.g., Momand v. Universal Film Exchanges, Inc.*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 434, 436 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 972 (1981).

But the record does not sustain the AT&T position. What Hexter assumed was that "to the extent that there were any marketing practices either related directly or indirectly to the interface device that may have been harassing or uncooperative," that these practices would not be present in the " 'but for' world." He made an effort to segregate how much in lost profits related to the interface and to pricing or marketing practices, but rejected it because he did not believe that the results were fruitful. He assumed that Bell would know its own costs and would price toughly but competitively and that companies challenging Bell would, everything else being equal, be able to compete and make a profit. He did not

assume that any particular AT&T pricing practices would be eliminated. In short, there is no evidence that Hexter assumed AT&T's prices were illegal or that he made specific assumptions about how individual AT&T pricing practices would have changed. AT&T did not submit contrary evidence. How else lost profits can be proved in an antitrust case, we are not told. In short, there was an evidentiary basis for the jury award which—all things considered—was modest in light of the fact that Litton's lost profits were limited to years prior to 1978. *See generally Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946), *Eastman Kodak Co. v. Southern Photo Material Co.*, *supra*, at 378-79.

H. *Sanctions on Litton for Failure to Provide Discovery*

The trial court upheld the magistrate's finding[52] that Litton's attorneys had engaged in a "pattern of intentional concealment of evidence" relating to the finder's fee investigation in connection with Litton's San Mateo office; the evidence specifically consisted of certain notes

[52] Litton argues that Magistrate Sinclair should have been disqualified from presiding over pretrial discovery because some four to seven years prior to this litigation he worked as an associate on a case that eventually resulted in Litton threatening to sue his law firm for malpractice. Our review of the record leads us to agree with Judge Conner that it "is not reasonably conceivable" that Sinclair was likely to be prejudiced against Litton as a result of this earlier involvement. Litton also argues that it was error to assign Magistrate Sinclair the task of conducting an evidentiary hearing on discovery order violations. While we may agree that it would have been better practice to assign this task to another magistrate, Magistrate Sinclair was clearly in the best position to review compliance with the 122 discovery orders issued in this case. The district court reserved to itself the question of what sanctions would be imposed for any discovery violations; Sinclair's review of the record did not exceed the scope of authority granted to magistrates under 28 U.S.C. § 636(e)(5) (Supp. IV 1980) (magistrate may certify to the district court facts relating to "act or conduct which if committed before a judge . . . would constitute contempt").

that were in the bottom of the drawer of in-house counsel Roberts until the late summer of 1979. *See Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 90 F.R.D. 410 (S.D.N.Y. 1981). The court concluded that the Roberts notes were material to preparation for AT&T's defense that Litton BTS went out of business as a result of mismanagement, incompetency and dishonesty, rather than as a result of AT&T's antitrust violations. It found other Litton in-house counsel grossly negligent for stating in connection with the taking of Roberts' deposition that there were no other relevant documents, without having reviewed all of Roberts' files; in representing in an April 24, 1978 brief that the Bruder investigation (after the then new President of Litton BTS, Robert Bruder) in 1973 was directed only at the San Mateo matter when in fact San Mateo was only one of seven instances of suspected misconduct Bruder wanted investigated; in representing in the same brief that all of Roberts' interview notes had been turned over to the San Mateo County District Attorney when in fact the notes of Roberts' interviews with five Litton BTS employees had not been turned over; in representing in another brief filed December 6, 1978 that Litton had produced all "notes and memorandums of interviews of persons not connected with the San Mateo matter;" in failing to turn over to AT&T Roberts' notes following the court's opinion and order of March 26, 1979, which specifically rejected the argument that work product immunity attached to the interview reports; in representing in a letter of July 6, 1979 that Roberts had taken no notes of his interview with Litton BTS employee Hoxie when in fact Hoxie had testified that he had been interviewed. The court also found "willful misconduct" on the part of Litton's general counsel in this litigation; after receipt of the complete set of Roberts' interview

notes in the late summer of 1979, counsel failed to apprise the magistrate, the district court and the defendants of the existence of the additional notes to correct the earlier erroneous assertions that had been made. Even after production of handwritten copies of Roberts' notes of interviews with certain Litton BTS employees, the entire notes were not produced and it was claimed that the notes withheld involved matters "wholly extraneous" to the case, when in fact they also involved notes on the use of fake finders, finders' fees and other matters. But the court refused Bell's requested sanction of dismissal and instead denied Litton recovery of all costs and attorneys' fees to which it would otherwise be entitled as a matter of law, including those under Section 4 of the Clayton Act, 15 U.S.C. § 15. *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 91 F.R.D. 574 (S.D.N.Y. 1981).

Needless to say, the parties disagree entirely on the sanctions imposed. AT&T would have the action dismissed and Litton disentitled to recover one dime, a sanction which is within the court's discretion to impose. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam); *Penthouse International, Ltd. v. Playboy Enterprises Inc.*, 663 F.2d 371, 386-92 (2d Cir. 1981); *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir. 1979). Litton argues that a penalty of over $10 million is excessive, especially where counsel supervised the disclosure of three and one half million documents in a professional manner and where the notes were ultimately turned over without any prejudice to AT&T by virtue of their late production because the notes (a) were inadmissible hearsay, (b) contained no specific information, and (c) were unimportant because the whole subject of finders' fees was mentioned only once in the course of

an entire five hour summation by AT&T counsel before the jury. Litton also argues that under *Upjohn Co. v. United States*, 449 U.S. 383 (1981), decided since the district court's sanctions orders were made, the miscellaneous notes were, in fact, privileged and should never have been turned over to AT&T at all, as Litton had consistently urged the magistrate and district court with the agreement of the magistrate in the first instance.[53]

We affirm the district court in this regard. The payment of attorneys' fees is a part of the penalty for violating the antitrust laws. *Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 859-60 (7th Cir. 1981); *Farmington Dowell Products Co. v. Forster Manufacturing Co.*, 421 F.2d 61, 90 (1st Cir. 1969). At the same time there is no doubt that attorneys as officers of the court must operate on an honor system, *Litton Systems, Inc. v. AT&T Co.*, 90 F.R.D. at 417 (S.D.N.Y. 1981), and must be appropriately disciplined to provide both specific and general deterrence. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980); *National Hockey League v. Metropolitan Hockey Club, Inc.*, *supra* at 643. Federal Rule of Civil Procedure 37(b) expressly empowers the court to impose a wide range of specified sanctions for failure to obey court orders. *See Roadway Express, Inc.*, *supra*, at 763-64; *Stanziale v. First National City Bank*, 74 F.R.D. 557

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[53] Litton contends that the Roberts notes should have been protected as attorney work product under *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (when house counsel and general counsel interviewed middle-echelon corporate employees regarding possible foreign government bribes, notes of the interviews held privileged as made between attorney and client). But as Litton concedes, Litton Brief at 121, the internal investigation focused on the employees' own possible misconduct; they were not speaking on behalf of the corporation or in furtherance of its business. The "remote possibility" of criminal litigation involving Litton itself was not sufficient to create a work-product immunity, *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974).

(S.D.N.Y. 1977). Given the court's express findings of bad faith, it could also have imposed sanctions on Litton as an exercise of its inherent powers. *See Roadway Express, Inc., supra*, at 764-67. It is immaterial that the notes themselves were ultimately ruled inadmissible on the ground that they were hearsay since they were "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Thus where there is repeated defiance of express court orders dismissal may be an appropriate remedy. *National Hockey League, supra*, at 640 (refusal for 17 months to answer "crucial" interrogatories); *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 666 (2d Cir. 1980) (doing "absolutely nothing at all" to comply with discovery orders or move the case to trial); *Cine Forty-Second Street, supra* (refusal for three years, without moving for protective order, to comply with specific orders to answer interrogatories on damages).

At the same time, because dismissal denies the party access to justice, if the party has a valid claim, dismissal would, in the case of attorney misconduct such as gross negligence, amount to a windfall to an adversary to be resorted to only when necessary to preserve the integrity of the judicial system, or in similar "extreme circumstances." *Interconex, Inc. v. Federal Maritime Commission*, 572 F.2d 27, 30 (2d Cir. 1978); *Israel Aircraft Industries, Ltd. v. Standard Precision*, 559 F.2d 203, 208 (2d Cir. 1977); *Independent Productions Corp. v. Loew's Inc.*, 283 F.2d 730, 733 (2d Cir. 1960). *See also Cine Forty-Second Street*, 602 F.2d at 1064 (dismissal should "be deployed only in rare situations"). Thus the trial court in imposing sanctions expressed its agreement with the concurring opinion in *Cine Forty-Second Street* that it

is difficult to "visit upon the client the sins of counsel, absent client's knowledge, condonation, compliance, or causation." *Id.* at 1069.

We believe that the trial court, thoroughly familiar with the record, the parties, as well as the efforts, conduct and omissions of counsel, quite correctly struck a wise balance between the conflicting interests in imposing antitrust penalties under the Clayton Act on the one hand and preserving the integrity of the discovery process on the other. Dismissal of the case would be inappropriate in the light of the limited ultimate role that the Roberts notes played. The imposition of the sanction of no award of attorneys' fees and costs is expensive for Litton, to be sure, but the failures and obstructions of house counsel Roberts, house counsel's conduct at the taking of Roberts' deposition, and the conduct of general counsel, found by the district court in its familiarity with the record and these parties to constitute gross negligence and willful misconduct, led to the sanction. Thus while the damages and hence statutory attorneys' fees in this case are so substantial that in effect Litton (or perhaps to some extent counsel) is being penalized in a sum that on its face is larger than 99 percent of the judgments awarded in any court, it is still only a small fraction of the ultimate recovery here involved. Indeed, where the stakes are as high as they are in this case, the penalties for obstruction of the truth must be impressive if they are to be effective, yet they must not be so drastic or unfair as the penalty of dismissal. Indeed, in such a case, dismissal is so unlikely to be imposed that, absent steep penalties, Rule 37 would be at most a "paper tiger." Rosenberg, *New Philosophy of Sanctions*, in New Federal Civil Discovery Rules Sourcebook 140, 141 (W. Treadwell ed.

1972). We believe that the trial court acted soundly and correctly, as well as wisely, in imposing the sanction. We decline to set it aside on behalf of either party.

In view of our disposition of the case we need not reach the issues on Litton's cross appeal.

Judgment affirmed.

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APPENDIX B

District Court's Opinion Denying The Motion To Dismiss And Motion For Partial Summary Judgment

LITTON SYSTEMS, INC. et al., Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY et al., Defendants.

NEW YORK TELEPHONE CO., INC. et al., Counterclaimants,

v.

LITTON SYSTEMS, INC. et al., Counterdefendants.

No. 76 Civ. 2512 (WCC).

United States District Court, S. D. New York.

March 4, 1980.

Theodore F. Craver, Larry L. Yetter, Litton Industries, Inc., Beverly Hills, Cal., Howrey & Simon, Washington, D. C., Curtis, Mallet-Prevost, Colt & Mosle, New York City, for plaintiffs; William Simon, John Bodner, Jr., Francis A. O'Brien, Ralph Gordon, Kevin P. McEnery, Washington, D. C., Peter E. Fleming, Jr., New York City, of counsel.

Dewey, Ballantine, Bushby, Palmer & Wood, New York City, for defendants; Leonard Joseph, O. Nile Bell, J. Paul McGrath, Harvey Kurzweil, New York City, of counsel.

OPINION AND ORDER

CONNER, District Judge:

This antitrust action is before the Court on objections filed by both sides, pursuant to 28 U.S.C. § 636(b)(1), to the Recommended Decision of Magistrate Kent Sinclair, Jr. submitted September 21, 1979, on defendants' motion for judgment of dismissal on the pleadings or for partial summary judgment.

The complaint charges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by conspiring and attempting to restrain trade in and to monopolize, and by monopolizing, the interstate sale and leasing of telephone terminal equipment, including private branch exchange ("PBX") and key telephone system ("KTS") equipment designed to interconnect defendants' telephone trunk lines selectively with a number of individual telephones within an office, store, plant or other facility. The complaint alleges that defendants sought to and did accomplish these illegal objectives by, *inter alia,* (1) filing with the Federal Communications Commission ("FCC") and with state regulatory agencies self-effectuating tariffs which provided that terminal equipment supplied by others could be interconnected with defendants' trunk lines only if there was interposed between them an interface device provided and maintained by defendants, said tariffs being supported by "incomplete, misleading and erroneous information"; (2) falsely disparaging the terminal equipment offered by competitors, including plaintiffs; (3) deliberately making the required interface equipment unnecessarily complicated, expensive and inefficient and delaying its production, installation and service; (4) predatorily pricing defendants' terminal equipment below its production cost; and (5) depriving plaintiffs of fair access to state regulatory agencies by improper payments to officials thereof and illegal political contributions.

Plaintiff Litton Systems, Inc. ("Litton") is a Delaware corporation with its principal office in Beverly Hills, California, selling products and services in a wide range of business areas, including aerospace, communications, computers, shipbuilding and minerals exploration. Until 1974, its wholly-owned subsidiary, plaintiff Litton Business Telephones System, Inc. ("BTS") manufactured and sold telephone terminal equipment in competition with defendants. The complaint alleges that BTS sustained losses and eventually went out of business as a result of defendants' antitrust violations.

Defendants (collectively referred to hereinafter as "AT&T" or ("Bell") include American Telephone & Telegraph Co.; its manufacturing subsidiary, Western Electric Company; its research subsidiary, Bell Telephone Laboratories, Inc.; and seven of its fully- or majority-owned regional operating companies. Intrastate telephone service is provided by the regional operating companies, whose rates and practices operations are controlled by state and local regulatory agencies, while interstate service is provided by AT&T's Long Lines Division under regulation by the FCC.

After extensive discovery, defendants moved for judgment of dismissal on the pleadings on the grounds that all aspects of operation of the Bell system, specifically including the interconnection of equipment thereto, are subject to pervasive regulation by the FCC and by state regulatory commissions, and that the purposes of such regulation are incompatible with the objectives of the antitrust laws, so that such activities are impliedly immune from the antitrust laws under the doctrine of such decisions as *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963) (*"Pan Am"*); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973) (*"Hughes Tool"*); *Gordon v. New York Stock Exchange*, 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975) (*"Gordon"*); *United States v. National Association of Securities Dealers*, 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975) (*"NASD"*) and *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as specifically applied to the regulation of the market in ancillary telephone equipment in such cases as *Essential Communications Systems, Inc. v. American Tel. & Tel.*, 446 F.Supp. 1090 (D.N.J.1978), *rev'd*, 610 F.2d 1114 (3d Cir. 1979) rehearing denied, No. 78—2521 (3d Cir., filed November 23, 1979). Defendants alternatively moved for partial summary judgment or judgment on the pleadings on the ground that their alleged activities in attempting to influence administrative action were shielded from antitrust liability by the First

Amendment under the *"Noerr-Pennington"* doctrine established by *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (*"Noerr"*) and reaffirmed in *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 1592-93, 14 L.Ed.2d 626 (1965) (*"Pennington"*). Plaintiffs, on the other hand, contend that defendants, by their false and misleading submissions to the regulatory agencies, have attempted to subvert the regulatory process, so that the "sham" exception to the *Noerr-Pennington* doctrine, recognized in such cases as *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) ("California *Motor Transport*"), is applicable.

The motions were referred to Magistrate Sinclair for recommended decision pursuant to 28 U.S.C. § 636(b)(1)(B). In an unusually exhaustive and meticulous Recommended Decision 270 pages in length, exclusive of a 58-page appendix, Magistrate Sinclair recommended granting of the motion and dismissal of the entire complaint. He concluded that plaintiffs' "core" claims relating to defendants' activities before the FCC and the state regulatory commissions were immunized from antitrust liability in view of the pervasive regulation of the industry and because the specific conduct in question had, for the most part, been expressly sanctioned by the responsible agencies. He further recommended that the "Peripheral" claims relating to defendants' alleged "business torts" such as disparagement of competitive terminal equipment be dismissed as ancillary to the "core" activities and likewise subject to remedial action by the agencies.

In the alternative, Magistrate Sinclair recommended stay of the action and referral of all the claims therein to the FCC for consideration in the first instance, pursuant to the principle of primary jurisdiction, as articulated, for example, in *United States v. RCA*, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1958).

The Magistrate further recommended denial of defendants' motion for partial summary judgment under *Noerr-Pennington*

on the ground that there were material issues of fact bearing on the "sham" exception, particularly with respect to defendants' intentions relative to their challenged activities before the regulatory agencies.

In support of and in opposition to their exceptions to the Recommended Decisions, the parties have made massive and numerous written submissions. After due consideration thereof, and of the authorities cited therein, the Court has concluded, with due deference to the painstaking and conscientious effort of Magistrate Sinclair, that his recommendations that the action be dismissed on grounds of implied antitrust immunity or stayed pending referral for initial review by the FCC cannot be adopted. His recommended denial of defendants' motion to dismiss under the *Noerr-Pennington* doctrine is adopted. Defendants' motions are therefore denied in their entirety.

IMPLIED IMMUNITY

General Principles

There is an inherent and obvious tension between the emphasis on unrestrained competition underlying the antitrust laws and the "public interest" rationale underlying other instances of governmental regulation of business activity. The Sherman Act is premised on the theory that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources," *Northern Pacific Ry. v. United States,* 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958), and, to some extent, on the political and social desirability of smaller, competitive businesses, see *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 540–43, 93 S.Ct. 1096, 1104–06, 35 L.Ed.2d 475 (1973) (Douglas, J., concurring in part); *Northern Pacific Ry., supra,* 356 U.S. at 4, 78 S.Ct. at 517. The assumption underlying economic regulation, on the other hand, is that unrestrained competition in certain industries will not adequately serve the public interest either because the activity involved is, from the standpoint of

economic efficiency, a "natural monopoly" (certain utility activities, for example, see *Otter Tail Power Co. v. United States*, 410 U.S. 366, 369, 93 S.Ct. 1022, 1025, 35 L.Ed.2d 359 (1973)); or because the business conduct involved should be judged by criteria other than or in addition to competitiveness, such as convenience to the public or nondiscrimination in providing services (*e. g.*, certain activities of common carriers, see *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 453, 456–67, S.Ct. 716, 725–30, 89 L.Ed. 1051 (1945)), or the industry's importance to foreign commerce of the United States (*e. g.*, the shipping industry, see *Far East Conference v. United States*, 342 U.S. 570, 573, 72 S.Ct. 492, 493, 96 L.Ed. 576 (1972); Note, *Antitrust and the Shipping Industry*, 12 N.Y.U.J. Int'l L. & Pol. 115 (1959)), or the economic health of the regulated industry, see, *e. g., Gordon, supra*, 422 U.S. at 689, 95 S.Ct. at 2614 (protection of investors and stock exchanges). See generally II A. Kahn, The *Economics of Regulation: Principles and Institutions* (1971). Where Congress has established a regulatory agency to supervise the conduct of business within an industry according to a standard of "public interest," therefore, subjecting a regulated firm to antitrust liability based on competitiveness factors alone, as the antitrust laws require, see, *e. g., National Society of Professional Engineers v. United States*, 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978) (§ 1 case), may result in imposing on the business standards of conduct inconsistent with those established by Congress for that industry.

[1] Regulated industries "are not per se exempt from the Sherman Act," *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439, 456, 65 S.Ct. 716, 725, 89 L.Ed. 1051 (1945), even if the specific conduct complained of has been expressly approved by the agency charged with regulatory responsibility. *United States v. Radio Corp. of America*, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959). Rather, a court determining the applicability of the Sherman Act to a regulated industry must consider whether and to

what extent Congress intended to exempt activities of that industry from the antitrust laws.

In some industries, Congress has recognized the potential for conflict between the regulatory statutes and the antitrust laws and has expressly granted antitrust immunity for specified conduct; for example, in the interstate telephone field, FCC-approved mergers of telephone companies are expressly exempted. 47 U.S.C. §221(a) (1970). No such express immunity is claimed in this case.

[2] Courts have, in addition, found an implied antitrust immunity for certain activities in other industries covered by a regulatory scheme. Such immunity has been implied in two restricted instances: (1) when the agency's regulation of the industry is so pervasive that Congress may be assumed to have determined that unrestrained competition will not adequately protect the public interest, see *Otter Tail Power Co., supra,* 410 U.S. at 373–4, 93 S.Ct. at 1027–28; *Silver v. New York Stock Exchange,* 373 U.S. 341, 358–60, 83 S.Ct. 1246, 1257–1258, 10 L.Ed.2d 389 (1963); *RCA, supra,* 358 U.S. at 348–49, 79 S.Ct. at 465–66; see also *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 584, 96 S.Ct. 3110, 3114, 49 L.Ed.2d 1141 (1976) (discussion of pervasive state regulation); or (2) when a regulatory agency is authorized by statute to exercise, and has in fact exercised, authority over the particular practice under attack (as contrasted with the general field of activity) in a way which effectuates the regulatory scheme, *Gordon, supra; NASD, supra; Pan Am, supra; Keogh v. Chicago & Northwestern Ry. Co.,* 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922); see *Silver, supra,* 373 U.S. at 361–63, 83 S.Ct. at 1529–60.

The Supreme Court has articulated an exacting standard for the implication of antitrust immunity: "Repeal of the antitrust laws is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory

.provisions' will repeal be implied." *Gordon, supra,* 422 U.S. at 682, 95 S.C.T. at 2611. "Repeal is to be regarded as implied only if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary." *Silver, supra,* 373 U.S. at 357, 83 S.Ct. at 1257.

In an unusual article arguing the legal merits of a pending action—the government civil antitrust suit against the principal defendant here (*United States v. American Telephone & Telegraph Co.,* 427 F.Supp. 57, D.D.C.)—the author distilled from the case law the following five criteria for determining whether antitrust immunity should be implied:

> "(1) the conduct challenged in the antitrust complaint, as well as rates, entry, and investment in the market, should be continually subject to the supervisory authority of the regulatory agency; (2) the agency should have the power to grant the relief requested by the antitrust plaintiff; (3) the benefits of competition should enter into the agency's public interest calculation; (4) agency expertise should be particularly useful in deciding issues in the antitrust suit; and (5) the antitrust suit should involve important regulatory policy questions." Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity,* 85 Yale L.J. 254, 258 (1975).

The author added:

> "Any claim of immunity which can meet all of these criteria should certainly succeed."

Despite the author's conclusion that all five of the criteria are satisfied in the government's case against AT&T, as discussed more fully hereinafter, two judges have successively ruled in that case that there was no implied immunity for the activities of AT&T.

Legislative History

Because the touchstone of implied immunity is congressional intent, any discussion of implied immunity in the telephone

industry must begin with a consideration of the content and legislative history of the Federal Communications Act.

The history of federal regulation of interstate communications carriers began with the Mann-Elkins Act of 1910, Pub.L. No. 218, 36 Stat. 539 which amended the Interstate Commerce Act to bring communications carriers under the jurisdiction of the Interstate Commerce Commission ("ICC"), 36 Stat. at 544, and established a mechanism for their regulation. A decade later, recognizing the desirability of unification of telephone networks and elimination of duplicative facilities, Congress, in the Willis-Graham Act of 1921, Pub.L. No. 15, 42 Stat. 27, empowered the ICC to grant antitrust exemption to mergers or acquisitions of local telephone companies which it found to be in the public interest.

In 1934, the regulatory apparatus was drastically revised by the Federal Communications Act, 47 U.S.C. §§ 151 *et seq.* ("the 1934 Act"), which created a separate agency, the FCC, with authority to regulate the interstate telephone, telegraph and radio communications industries. Congress expressly recognized that, by a series of mergers and consolidations, and by the creation of holding companies, AT&T had achieved a monopoly position in interstate telephone toll and private line services. H.Rep.No. 1273, Pt. III, No. 1, 73d Cong., 2d Sess. 856-60 (1934); S.Rep.No.781, 73d Cong., 2d Sess. at 2 (1934). Although Congress expressed the belief that the ICC should have scrutinized these annexations more carefully for possible abuses, H.Rep.No.1273, *supra* at 930-32, it reaffirmed the ICC's authority to grant antitrust exemptions for mergers in the public interest, 47 U.S.C. § 221, while reinforcing the ICC's power to insure the provision of efficient service at reasonable and non-discriminatory rates. 47 U.S.C. § 201; see S.Rep.No.781, 73d Cong., 2d Sess., 1-5 (1934).

The 1934 Act gives the FCC broad regulatory powers over telephone carriers, leaving to the FCC itself the responsibility for

determining the scope of these powers. S.Rep.No.781, 73d Cong., 2d Sess. 1-2 (1934). Among the powers central to its mission are the control over the construction of new telephone lines and facilities and the discontinuance of service over existing facilities, such entry and exit requiring an FCC certificate of public convenience and necessity. 47 U.S.C. § 214(a), (b). Upon allowing entry of a new carrier, the Commission may order interconnection of its lines with those of existing carriers. 47 U.S.C. § 201(a).

The 1934 Act declares illegal any unjust, unreasonable, discriminatory or preferential charge or practice. 47 U.S.C. §§ 201(b), 202(a). At least ninety days before implementing any new charge or practice, the carrier must file with the Commission and publish generally a tariff setting forth the proposed charge or practice. 47 U.S.C. § 203 (1978 Supp.). No company may function as a communications carrier unless such tariffs have been filed, 47 U.S.C. § 203(c), and the carrier must not deviate from the tariff until it is modified as provided by law. 47 U.S.C. § 203(b), (c).

The Commission may conduct hearings to determine the reasonableness of the charge or practice and may suspend its effective date for a maximum of five months. 47 U.S.C. § 204(a) (Supp.1978). If it determines that the charge or practice is unreasonable, the Commission may promulgate a substitute which it deems just and reasonable. 47 U.S.C. § 205(a). It may enforce its orders by injunction and by a fine of $1,000 for each day of violation. 47 U.S.C. §§ 205(a), (b). And an injured party may obtain damages for unreasonable discrimination in a proceeding before the Commission or in an action in a district court. 47 U.S.C. § 207.

In aid of its determination of the reasonableness of rates and charges, the Commission regularly evaluates the property of the carrier, 47 U.S.C. §§ 213(a), (c), and is empowered to require the filing of annual reports, and to prescribe accounting practices and allowable depreciation charges. 47 U.S.C. §§ 219, 220.

In the 1934 Act, there is no express direction that the FCC, in determining the reasonableness of rates or practices, should take into account antitrust considerations. However, the power to enforce certain sections of the Clayton Act is conferred on the FCC by Section 11 of that Act, 15 U.S.C. § 21. That section specifically provides that no judgment of the FCC "shall in anywise relieve or absolve any person from any liability under the antitrust laws." 15 U.S.C. § 21(e). Moreover, Section 414 of the 1934 Act negates any inference that the federal regulatory scheme was intended to supplant the antitrust laws:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414.

Administrative History

A major portion of Magistrate Sinclair's Recommended Decision (pages 32 to 166) is devoted to an exhaustive description of the elaborate system of regulations and rules which the FCC has promulgated for the purpose of regulating the telephone industry. From even a cursory review of that material, it is obvious that the FCC has both the statutory authority and the regulatory framework for controlling the operations of AT&T so as to prevent many of the anticompetitive abuses alleged in the complaint, particularly those relating to rates and interconnection practices.

In actual operation, however, the regulatory ideal of the 1934 Act is far from realization. The volume of tariff filings is simply far too great to permit meaningful review of all of them by the Commission.

During the 12-month period from September 1974 through August 1975, the Commission received 1,371 tariff filings totalling 11,491 pages, and was able to investigate only a small percentage of them. The Commission itself has therefore stated that

the tariffs "generally proceed from the carrier's independent judgment." Memorandum of the FCC, filed December 30, 1975, as cited in *United States v. AT&T*, 461 F.Supp. 1314, 1326–27 (D.D.C.1978).

The laxity and lag in the FCC's control over AT&T's tariff practices is particularly evident in the history of the equipment interconnection restrictions challenged here.

For many years, AT&T's tariffs on file with the FCC flatly prohibited subscribers from connecting to the Bell System any apparatus not obtained from one of the Bell companies. In 1956, this restriction was finally invalidated not by the FCC but by the Court of Appeals for the District of Columbia in an action brought by the manufacturer of a mechanical shield adapted to be clipped onto a telephone mouthpiece to provide privacy and reduce noise pickup. *Hush-a-Phone Corp. v. United States*, 99 U.S.App.D.C. 190, 193, 238 F.2d 266, 269 (D.C.Cir.1956), *rev'g* 20 F.C.C. 391 (1955), *on remand*, 22 F.C.C. 112 (1957). The court ruled the restriction unreasonable under Section 201(b) of the 1934 Act as an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."

Disregarding the broad language of the *Hush-a-Phone* ruling and construing it in the narrowest sense as relating only to mechanical attachments, AT&T filed a new tariff which prohibited "direct electrical connection" of any type of device with the telephone lines.

In 1965, an action was brought in the Northern District of Texas by the manufacturer of a device for connection of a base radio station to the telephone lines so that users of two-way mobile radios could communicate through the telephone system, charging that the revised tariff violated the antitrust laws. The court referred the controversy to the FCC for determination in the first instance under the principle of primary jurisdiction.

Carter v. American Telephone & Telegraph Co., 250 F.Supp. 188 (N.D.Tex.), *aff'd*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967). Thereupon, eleven years after filing of the tariff and only after being prompted by the court reference, the FCC began its first investigation of the legality of the restriction. Once the Commission was prodded into action, however, it took little time to determine that the restriction was unreasonable within the contemplation of Section 201(b) of the Act, and to direct AT&T to file a new tariff permitting the connection of equipment obtained from other sources, where such connection would not adversely affect the performance of the telephone system. *In re Use of the Carterfone Device*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968). Although the Commission recognized that the integrity of the network was a legitimate concern, it expressly rejected AT&T's contention that such integrity required that only Bell-supplied equipment be electrically connected to the system. It also declined to limit the scope of its ruling to the Carterfone device, because allowing the AT&T tariff to continue in effect with respect to other electrically connected equipment would constitute "a clearly improper burden upon the manufacturers and users of other devices," 13 F.C.C. at 425. It stated that AT&T could prohibit the interconnection of only those devices which actually cause harm to the system and could set up reasonable standards to exclude harmful equipment.

Again disregarding the broad implications of the Commission action, AT&T filed new tariffs permitting the electrical interconnection of customer-supplied equipment but imposed the requirement that such equipment be connected to the telephone lines only through "protective connecting arrangements" supplied and maintained by AT&T. Objections were filed to these *"post-Carterfone"* tariffs by a number of suppliers of competitive equipment and by the United States; however, the Commission ruled that because the new tariffs did not contravene the express direc-

tives of *Carterfone* (since that case involved the interconnection of ancillary equipment rather than "replacement of [a] part of the telephone system"), it would permit the tariffs to become effective pending commission review, emphasizing that "in doing so, we are not giving any specific approval to the revised tariffs." The Commission simultaneously ordered its staff to commence immediately a technical investigation to consider what further changes were necessary in light of a number of unresolved questions. *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610-11 (1968), *reconsideration denied*, 18 F.C.C.2d 871 (1969).

This investigation covered the next four years and resulted in a report concluding that the objective of protecting the integrity of the system would be served by permitting the interconnection of customer-supplied equipment meeting technical standards to be specified. The FCC accepted the report and initiated a Notice of Inquiry and Proposed Rule Making. *Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS*, 13 F.C.C.2d 539 (1972). Three years later, on November 7, 1975, the Commission promulgated standards for the registration of equipment that would "provide the necessary minimal protection against network harm." *Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS*, First Report and Order, 56 F.C.C.2d 593, 599 (1975), *on reconsideration*, 57 F.C.C.2d 1216, 58 F.C.C.2d 716, 59 F.C.C.2d 83 (1976). To forestall further evasion of the spirit of its mandate, the FCC ordered AT&T not to require the interposition of an interface device between registered customer-supplied equipment and the telephone system or to "impose other conditions contrary to the *Carterfone* policy without prior approval of the Commission ." 56 F.C.C.2d at 599.

This registration system has been in effect since 1975.

Discussion

Since the parties do not contend that the Federal Communications Act confers express immunity from the antitrust laws to

telephone carriers regulated by the FCC, this case must turn on the applicability of the two types of implied immunity described above: (1) immunity implied because the regulatory scheme established by Congress is so pervasive as to impliedly repeal the operation of the antitrust laws; or (2) immunity implied because the FCC, in accordance with its regulatory mandate, has ruled specifically as to interconnection of customer-supplied equipment in a way which conflicts with the application of antitrust principles to AT&T's filings for the years in question.

Prior Decisions on Interconnection Restrictions

The precise issue of implied immunity in connection with AT&T's filing of tariffs requiring AT&T-supplied interface equipment has been addressed recently in several highly persuasive opinions, including *Essential Communications Systems, Inc. v. AT&T, supra* (3d Cir. 1979); *United States v. AT&T*, 461 F.Supp. 1314 (D.D.C.1978, Greene, J.); and *United States v. AT&T*, 427 F.Supp. 57 (D.D.C.1976, Waddy, J.), *petition for cert. denied*, No. 77-1009 (D.C. Cir., filed May 26, 1977), *cert. denied*, 429 U.S. 1071, 97 S.Ct. 824, 50 L.Ed.2d 799 (1977).

Judge Greene's opinion in *United States v. AT&T* and Judge Waddy's earlier opinion in the same case consider the question of antitrust immunity in the context of a broad government challenge to AT&T's conduct of the telephone business, including AT&T's resistance to the entry of other, specialized carriers into the telecommunications service market, as well as AT&T's efforts to reduce or eliminate competition in the provision of ancillary telephone equipment. In that broad context, Judge Greene held (1) that the wording of the Federal Communications Act, the "relatively weak" regulatory power of the FCC to supervise telephone tariffs, and the practical inability of the FCC to scrutinize all the tariffs submitted to it indicated that, in the areas described, FCC regulation was not "pervasive" within the meaning of *Gordon, supra*, or *Otter Tail, supra*, see 461 F.Supp. at 1326;

and (2) that the FCC's failure specifically to approve the tariffs involved, and the Court's finding that the business practices contained in the tariffs were included as a result of AT&T's business judgment, rather than regulatory coercion or approval, indicated that no specific conflict existed between the FCC's exercise of its regulatory authority and the application of antitrust scrutiny to AT&T's alleged anti-competitive actions, including its interface device requirement and its predatory marketing practices. Judge Greene stated:

> "There is absolutly nothing to suggest that Congress expected the Commission to require or approve, or that the Commission did require or approve any of those practices. These activities not only violate the antitrust laws but they are also inconsistent with the very purposes of the regulation, or at the very least they are not required or encouraged either by the regulatory theory or by regulatory action." 461 F.Supp. at 1328.

Judge Waddy similarly found that no broad implied repeal of the antitrust laws covered AT&T's alleged activities in the government suit. 427 F.Supp. at 61.

In *Essential, supra,* a case specifically challenging the AT&T interface equipment requirement, the Court of Appeals for the Third Circuit, after tracing the history of the 1934 Act and of AT&T's tariff practices thereunder, found that AT&T's filing of and adherence to its tariff under § 205 was not immune to antitrust attack by *suppliers* of equipment (since any FCC regulatory approval under § 205 would be for the benefit of *customers* under the nondiscrimination goal of the statute, so that the "filed tariff" doctrine of *Keogh, supra,* would bar damages recovery by those customers only). *Id.* at 1123-1124. Moreover, the Third Circuit found that no conflict existed between the FCC's actions and application of the antitrust laws because

> "[t]he FCC never approved the 1968-1975 tariff. Instead of holding a hearing immediately after the filing as permitted

> by the Act, the FCC told AT&T to file a tariff subject to later approval or disapproval in accordance with certain independent studies commissioned by the agency. In effect, the FCC suspended its judgment pending further study. We do not feel that this course of conduct rises to the level of agency approval that might require implied immunity. Postponement of action by the agency cannot be construed as approval requiring a court to refrain from enforcing the antitrust laws, especially where, as here, the agency ultimately declared defendant's interim conduct improper. Thus we find no basis for the conclusion that the enforcement of section 4 of the Clayton Act in the form of money damages would present a conflict with the policies of the 1934 Act." At 1124.

Significantly, this decision reversed the judgment of the District Court dismissing the complaint on the ground of implied immunity, *Essential Communications Systems, Inc. v. AT&T*, 446 F.Supp. 1090 (D.N.J.1978), a decision heavily relied upon by Magistrate Sinclair in his Recommended Decision.

In a number of other recent decisions, the Courts have likewise found no implied immunity in connection with AT&T's interface device requirement. *Sound, Inc. v. AT&T*, Civ.No. 76–186–2 (S.D.Iowa, September 27, 1979); *Jarvis, Inc. v. AT&T*, 487 F.Supp. 120 (D.D.C.1978, Robinson, J.); *Interconnect Planning Corp. v. AT&T*, 465 F.Supp. 811 (S.D.N.Y.1978); *Northeastern Telephone Co. v. AT&T*, 1979–1 Trade Cases 77,171 (D.Conn.1978).

In addition to all these cases involving the interface device requirement, the courts in three other cases have considered the question of implied antitrust immunity in the closely similar context of AT&T's refusal to interconnect with other communications carriers, and in all three have ruled that there was no implied immunity. *MCI Communications Corp. v. AT&T*, 462 F.Supp. 1072 (N.D.Ill.1978) (interconnection with microwave transmission link between Chicago and St. Louis); *Woodlands Telecommunications Corp. v. AT&T*, 447 F.Supp. 1261

(S.D.Tex.1978) (interconnection with local telephone system in new community development near Houston); *Southern Pacific Communications Co. v. AT&T*, civil action 78-0545 (D.D.C. July 2, 1979) (interconnection with intercity business telecommunications system). The opinions in these three carrier-interconnection cases, and particularly that of Judge Grady in MCI, are also highly persuasive.

In *MCI*, Judge Grady, after a detailed analysis of the court decisions finding implied antitrust immunity in other administrative settings, and a thorough review of the legislative and administrative history of the 1934 Act, concluded that the FCC lacked the ability to grant relief for the types of anticompetitive activity allegedly engaged in by AT&T in that case (and here).

> "Unlike the statute analyzed in *Pan Am*, the Federal Communications Act does not have a section authorizing the FCC to grant relief from the variegated conduct included within the concept of 'unfair competition.' " *Id.* at 1086.
>
> "* * * Throughout the hearings, the Committee members assumed that the Sherman Act and the state antitrust laws would continue to apply to abuses arising from the existing, unaffected competition between telephone companies.
>
> [citing Hearings on S.1313 before the Joint Committee on Interstate Commerce, 67th Cong., 1st Sess. 17 at 26–27].
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> "Therefore, nothing in the statute itself or its legislative history leads to the conclusion that the FCC has exclusive jurisdiction to remedy acts of unfair competition such as customer interference, false advertising, or trade disparagement.
>
> "Equally important, FCC proceedings do not provide the relief which MCI seeks. In its complaint, MCI prays for treble the damages its business sustained by reason of AT&T's exclusionary practices and for an injunction against AT&T's commission of future predatory acts." *Id.* at 1087.
>
> "* * * we must conclude that plaintiff's remedy for the acts of unfair competition alleged in the complaint is not

adequate because Sections 206–209 do not provide for treble damages, do not compensate competitive injury, and only provide for piecemeal consideration of allegedly predatory acts." *Id.* at 1088.

There are two decisions reaching the contrary conclusion that there is implied immunity in connection with AT&T's interface-device requirement, both by the same district court for the Central District of California: *Phonotele, Inc. v. AT&T,* 435 F.Supp. 207 (C.D.Calif.1977, Gray, J.); *Monitor Business Machines, Inc. v. AT&T,* 1978–1 Trade Cases 74,444 (C.D.Calif.1978, Williams, J.).

The force of these two decisions is somewhat weakened by their reliance on an earlier decision of the same court in *Dasa Corp. v. General Telephone Co. of California,* 1977–7 Trade Cases 72,536 (C.D.Calif.1977, Lydick, J.). In *Dasa,* the court considered the issue of implied antitrust immunity in the context of an alleged conspiracy between General Telephone Co. of California and the supplier to it of a "divert-a-call" device which automatically switches an incoming call from one telephone number to another. In a brief, 1½-page opinion, containing little by way of analysis, the court ruled that there was implied immunity, expressly basing that decision upon its conclusion that the ruling of the Fourth Circuit in *North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir. 1976), *cert. denied,* 429 U.S. 1027, 97 S.Ct. 651, 50 L.Ed.2d 631 (1976), was "controlling." That conclusion is difficult to understand. All that the *North Carolina* decision ruled was that the FCC had "primary authority" to order the interconnection of customer-supplied terminal equipment with the national telephone network, despite tariffs filed with and approved by State regulatory agencies prohibiting such interconnection with "intrastate" facilities. The Court did not rule that the FCC's authority to disapprove tariffs immunized from antitrust attack all activities associated with their filing. Indeed, the issue of antitrust immunity was neither involved nor discussed.

Phonotele, supra, was the only one of the opinions finding implied immunity which contained any substantial analysis of the factors giving rise to the implication of immunity. Judge Gray did not merely rely on Judge Lydick's decision in *Dasa,* but also found that four of the five factors listed in the Yale Law Journal note cited hereinabove were present: that the activities charged as antitrust violations involve the "precise ingredients" of the FCC's regulatory authority; that the FCC has authority to grant the relief sought there (an injunction and damages); that competition is a component of the "public interest" standard which guides the FCC's regulatory decision; and that the FCC has considerable expertise in the field. However, Judge Gray did not discuss, nor apparently consider, how the regulatory scheme, so fine in concept, had actually worked in practice.

Monitor, supra, was another very brief opinion, less than 2 pages in length, containing scant analysis but relying principally on the prior decisions of Judges Lydick and Gray in *Dasa* and *Phonotele.*

The weight of authority in cases involving the issue of antitrust immunity in connection with the filing of restrictive tariffs with the FCC thus overwhelmingly favors the conclusion that no such immunity exists.

Other Decisions on Implied Immunity

The Recommended Decision, and the defendants in supporting it, rely heavily upon the Supreme Court decisions finding implied immunity in the areas of airlines and securities regulation. These decisions were considered at length in the aforementioned cases involving communications regulation and found not to be controlling in the latter environment, because of differences in the statutory schemes and in the actual degree of administrative oversight.

In *Pan Am, supra,* the government charged that Pan Am had violated the antitrust laws by effectively allocating territories between itself and its subsidiary, Panagra, for example, by preventing Panagra from filing with the Civil Aeronautics Board ("CAB") a petition for a route extension from the Canal Zone to the United States. The Supreme Court found that Section 411 of the Civil Aeronautics Act of 1938, 49 U.S.C. § 1381, granted the CAB express authority to investigate complaints of unfair methods of competition and, employing a "public interest" standard which expressly required the CAB to consider the effects on competition, to issue cease and desist orders. The Court therefore concluded that the 1938 Act gave the CAB power to grant the only relief sought—divestiture of Panagra—and that antitrust immunity should therefore be implied:

> "* * * where the problem lies within the purview of the Board, as do questions of divisions of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand." 371 U.S. at 312, 83 S.Ct. at 486.

The ruling was expressly confined to the specific abuses charged in that case and was based on the CAB's exclusive jurisdiction to remedy them:

> "We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed." *Id.* at 313, 83 S.Ct. at 486.

In *Hughes Tool, supra,* TWA charged that Hughes Tool's control over TWA's acquisition and financing of aircraft, through Hughes Tool's ownership of 45% of TWA's common stock, violated the antitrust laws. Hughes Tool moved for dismissal on the ground that the CAB had specifically approved its acquisition of the stock, so that antitrust immunity should be implied under the principle of *Pan Am.* Again the Court made an expressly limited ruling:

> "* * * [T]he authority of the Board to grant the power to 'control' and to investigate and alter the manner in which

that 'control' is exercised leads us to conclude that this phase of CAB jurisdiction, like the one in the *Pan American* case, pre-empts the antitrust field. 409 U.S. at 385, 93 S.Ct. at 660.

* * *

"We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws.

> 'While the Board is empowered to deal with numerous aspects of what are normally thought to be antitrust problems, those expressly entrusted to it encompass only a small fraction of the total.' 371 U.S. at 305 [83 S.Ct. at 482.]" *Id.* at 387, 93 S.Ct. at 661.

In his dissenting opinion in *NASD*, Justice White, joined by three other justices, again emphasized the limited applicability of *Hughes Tool*, stating that it "involved acts and transactions expressly immunized from antitrust scrutiny." 422 U.S. at 737, 95 S.Ct. at 2451.

In *Gordon, supra*, a class of small investors sued the New York Stock Exchange ("the Exchange") and two of its member firms for alleged violation of the Sherman Act by the system of fixed commission rates established by the Exchange for transactions of less than $500,000. The Supreme Court ruled that a provision of the Securities Exchange Act of 1934 permitting the Securities Exchange Commission ("SEC") to approve or disapprove commission rates conferred implied antitrust immunity. The Court found a demonstrable Congressional intent to leave the obviously anticompetitive practice of commission-fixing to Exchange self-regulation, subject to SEC approval, 422 U.S. at 667, 95 S.Ct. at 2604, and further that, in actual practice, the SEC had so closely supervised the Exchange's commission rate practices as to have effectively sanctioned them. *Id.* at 689, 95 S.Ct. at 2605.

Two separate concurring opinions emphasized the narrow bounds of the Court's ruling. Justice Douglas wrote:

"The mere existence of a statutory power of review by the SEC over fixed commission rates cannot justify immunizing

> those rates from antitrust challenges. * * *. Only if the SEC is actively and aggressively exercising its power of review can we be sure that fixed commission rates are being monitored in the manner which Congress intended." *Id.* at 691–92, 95 S.Ct. at 2616.

And Justice Stewart, joined by Justice Brennan, added:

> "The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants. An implied repeal of the antitrust laws may be found only if there exists a 'plain repugnancy between the antitrust and regulatory provisions,' *United States v. Philadelphia Nat. Bank,* 374 U.S. 321 [83 S.Ct. 1715, 10 L.Ed.2d 915]." *Id.* at 692, 95 S.Ct. at 2616.

In the present case, by contrast, there was no evident congressional design that AT&T would act as a self-regulator. Moreover, as previously discussed, the FCC's supervision over AT&T's activities has been far from tight. Finally, the only time the FCC ruled on the interface device requirement challenged here, it found it to be unreasonable and illegal; the SEC had for many years expressly approved the fixing of commission rates and had strongly resisted opening them up to competition.

NASD, supra, was an antitrust action by the government against the National Association of Securities Dealers ("NASD") and certain of its member firms, based on their agreement limiting sale of mutual fund shares except by issuers, underwriters and contract dealers, at the offering price described in the prospectus, thus preventing the development of a secondary dealer market.

The defendants moved for dismissal on the ground that Sections 22(d) and (f) of the Investment Company Act of 1940, 15 U.S.C. § 80a–22(d) and (f), either required or authorized such restrictions and that the Maloney Amendment to the Securities Exchange Act of 1934, 15 U.S.C. § 78*o*–3, provides a system of self-regulation by the registered voluntary associations, such as the NASD.

In a decision filed the same day as *Gordon*, a five-to-four majority of the Court found that:

> "The Commission-sponsored provision authorized the SEC to promulgate rules, regulations and orders prohibiting restrictions on the transferability or negotiability of mutual-fund shares, S.3580, § 22(d)(2), 76th Cong., 3d Sess. (1940). Commission testimony indicates that it considered this authority necessary to allow regulatory control of industry measures designed to deal with the disruptive effects of 'bootleg market' trading and with other detrimental trading practices identified in the Investment Trust Study." 422 U.S. at 722, 95 S.Ct. at 2444.
>
> "* * * the statute reflects a clear congressional determination that, subject to Commission oversight, mutual funds should be allowed to retain the initiative in dealing with the potentially adverse effects of disruptive trading practices.
>
> "The Commission repeatedly has recognized the role of private agreements in the control of trading practices in the mutual-fund industry." 422 U.S. at 727, 95 S.Ct. at 2446.

Despite the obvious anticompetitive effect of these agreements, the Court recognized that

> "* * * Congress has made a judgment that these restrictions on competition might be necessitated by the unique problems of the mutual fund industry, and has vested in the SEC final authority to determine whether and to what extent they should be tolerated 'in the interest of the holders of all outstanding securities' of mutual funds. 15 U.S.C. § 80a-22(f)." *Id.* at 729, 95 S.Ct. at 2447.

The Court emphasized that the SEC had discharged its statutory responsibility by continually monitoring the challenged practices of the NASD and "repeatedly has recognized the role of private agreements in the control of trading practices in the mutual fund industry." *Id.* at 727, 95 S.Ct. at 2447. More specifically, the Court noted that the SEC had reviewed the particular

NASD rule in question, and had expressly recognized its power to control such restrictions under Section 22(f). *National Association of Securities Dealers, Inc.*, 9 S.E.C. 38, 44–45 and n.10 (1944). The Court added:

> "* * * this contemporaneous interpretation by the responsible agency is entitled to considerable weight." *Id.* at 725, 95 S.Ct. at 2445.

In that connection, it was doubtless of some significance in *NASD* that the SEC filed an *amicus curiae* brief arguing that the complaint should be dismissed on the ground of implied immunity.

In the situation at bar, by contrast, the FCC filed in the government antitrust case, and the government filed in *Essential, amicus curiae* briefs contending that the FCC's regulation of the activities of AT&T was not such as to create implied antitrust immunity with respect to the tariffs here in question.

Summary

[3] There is nothing in the 1934 Act or in its legislative history which suggests that Congress intended that the regulation of communications carriers by the FCC would exempt from the antiturst laws all of the activities of such carriers relating to the regulated business. Quite the contrary, the Act specifically provides that nothing contained in it "shall in any way abridge or alter" statutory or common law remedies. 47 U.S.C. § 414 (1976). And the fact that the Act contains a specific provision granting antitrust exemption for mergers approved by the FCC, 47 U.S.C. § 221(a) (1970), clearly indicates that Congress contemplated no general exemption.

Moreover, the FCC itself has construed the Act as leaving undisturbed the jurisdiction of the courts over antitrust controversies arising out of activities which it has neither required nor approved. The FCC has expressly recognized that its control over

the activities of communications carriers, unlike that exercised by the CAB and the SEC over the airlines and the securities markets, leaves the carriers a considerable degree of control over their own operations.

AT&T formulates its own tariffs, based on its independent business judgment. From the history of the tariffs involved here, it would appear at least possible for a jury to infer that AT&T has not always been motivated exclusively by an altruistic concern for the public interest, and even that some of its actions have instead been influenced by an obsessive abhorrence of competition.

The FCC's admitted inability to review most of the tariffs filed with it, and the long delays experienced in determining the reasonableness of those it does examine, have created an obviously tempting opportunity for AT&T to obliterate competition for long periods simply by filing tariffs containing restrictions on competition even though they are foredoomed ultimately to be struck down. For example, by the time the interface device requirement was finally supplanted by the registration system in 1975, Litton's BTS subsidiary had failed and was on its way out of business.

The interface device requirement would seem difficult to justify as necessary to insure the integrity of the telephone network. If AT&T could provide telephone terminal equipment capable of being connected directly to the telephone lines without an interface device and without injury to the system, there is no apparent reason why other technically qualified manufacturers, including Litton, could not do so as well. It would seem to have been obvious from the outset that the system could be adequately protected by establishing specifications as to impedance loading and other electrical effects of interconnection with the terminal equipment, which is just what the FCC ultimately determined.

The complaint charges, in effect, that AT&T (knowing that the tariffs would probably remain in effect for a number of years

at least) included the interface device requirement in bad faith, then deliberately delayed the FCC's consideration of the reasonableness of the restriction and supplied false and misleading information to the FCC in connection therewith and, during the seven years the restriction remained in effect before the FCC finally declared it unreasonable, intentionally designed the interface equipment so as to degrade the audio quality of the signals, charged exorbitant prices for the interface equipment and deliberately delayed its production, installation and servicing, as well as falsely disparaging competitive terminal equipment which was in fact superior to the Bell equipment, and bribing the officials of state agencies to deny fair access and hearing to AT&T's competitors.

Whether plaintiff can prove these allegations remains to be seen. But, for purposes of testing the legal sufficiency of the complaint as against the challenge of implied immunity, the allegations must be accepted as true. *California Motor Transport, supra* at 515–16, 92 S.Ct. at 614.

What the complaint charges, in effect, is a calculated subversion of the regulatory scheme. The system of administrative supervision is not undercut but is complemented and reinforced by affording judicial relief for cynical evasion or corruption of that system for unfair competitive advantage. As Judge Grady stated in *MCI*, "even the most pervasive scheme of regulation cannot immunize someone from anticompetitive sham activity which seeks to abuse the regulatory process itself." 462 F.Supp. at 1098. See also *United States v. AT&T, supra*, 461 F.Supp. at 1328–29 (citing *Georgia v. Pennsylvania R.R., supra*).

There is no "plain repugnancy" between the FCC's authority to approve AT&T tariffs and the court's authority to provide a remedy to competitors who are injured by tariffs which are filed in bad faith and are ultimately disapproved, as well as by other acts of unfair competition not within the FCC's traditional area of

responsibility. Repeal of the antitrust laws is not "necessary to make the [regulatory scheme] work."

[4] The Court concludes that no implied immunity from the antitrust laws exists for the activities of AT&T alleged in the complaint.

NOERR-PENNINGTON IMMUNITY

[5] Defendants have also urged that such of their allegedly improper activities as were intended to influence governmental action are protected by the First Amendment under the doctrine of the *Noerr* and *Pennington* cases, *supra*. This contention need not occupy us long.

In *Noerr*, an association of trucking companies charged that a group of railroads, aided by a public relations firm, had conducted a massive campaign of deceptive publicity designed to foster legislation harmful to the truckers and to impair their relations with their customers. The Supreme Court after a review of the entire record, concluded that the publicity campaign was motivated by the railroads' efforts to influence legislation and that the injury sustained by the truckers was merely "incidental." The Court ruled that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135, 81 S.Ct. at 528. The Court explained:

> "In a representative democracy such as this, these [Legislative and Executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.* at 137, 81 S.Ct. at 529.

* * *

"The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138, 81 S.Ct. at 530.

However, the Court cautioned:

"[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144, 81 S.Ct. at 533.

In *Pennington*, a small coal company alleged that the United Mine Workers' Union and certain large coal companies had conspired to influence the Secretary of Labor to prescribe higher minimum wages and thereby squeeze it and other small operators out of business. The Supreme Court ruled:

"*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. * * Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670, 85 S.Ct. at 1593.

The *Noerr* opinion's suggestion that no immunity would exist for "sham" efforts to influence governmental action which were actually intended to injure competitors found practical application in *California Motor Transport, supra.* In that case, one group of highway carriers sued another, alleging that the defendants had conspired to put the plaintiffs out of business by instituting groundless state and federal proceedings to delay and defeat plaintiffs' applications to acquire and transfer operating rights, thereby depriving plaintiffs of free and unlimited access to the regulatory agencies. The Supreme Court ruled that the

District Court erred in dismissing the complaint for failure to state a cause of action, remarking:

> "It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute * * *. 404 U.S. at 514, 92 S.Ct. at 613. "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' * * * which the legislature has the power to control. * * * If the end result is unlawful, it matters not that the means used in violation may be lawful." *Id.* at 515, 92 S.Ct. at 614.

Likewise, in *Woods Exploration & Production Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972), the Fifth Circuit court ruled that the filing of false natural gas production forecasts for the purpose of influencing the Texas Railroad Commission to reduce plaintiffs' production allowances was an "abuse of the administrative process" which "does not justify antitrust immunity." 438 F.2d at 1298.

Magistrate Sinclair concluded, and this Court agrees, that the activities of defendants alleged in the complaint would, if proven, constitute such abuse of the administrative process as to come within the "sham" exception to the *Noerr-Pennington* doctrine. This doctrine, therefore, provides no basis upon which defendant's motion for summary judgment could be granted.

STATE ACTION

[6] Defendants further contend that the tariffs challenged here were filed at the direction of the FCC and the responsible state regulatory agencies and are therefore immune from antitrust attack under the "state action" doctrine enunciated in *Parker v. Brown, supra.* That contention likewise merits only brief discussion.

Parker v. Brown was an antitrust action seeking an injunction against enforcement of the provisions of the California Agricultural Prorate Act which restricted competition among raisin growers to prevent destructive price cutting. The Supreme Court ruled:

> "nothing in the language of the Sherman Act or in its history * * * suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. 317 U.S. at 350–51, 63 S.Ct. at 313.
>
> "* * * The state * * * as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352, 63 S.Ct. at 314.

In *Jeffrey v. Southwestern Bell,* 518 F.2d 1129 (5th Cir. 1975), the "state action" doctrine was applied to exempt from antitrust attack the activities of Bell's Southwestern regional operating company in filing with the Dallas City Council tariffs setting rates for telephone services within the city. The court stated:

> "Regulation by a governmental body of the rates to be charged by a public utility are a classic example of the *Parker v. Brown* exemption." 518 F.2d at 1134.

However, the Supreme Court has repeatedly emphasized that the "state action" exemption extends only to actions which are not merely at the instance of the state government, but which are specifically compelled by it.

For example, in *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Court considered "whether a minimum-fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar" violated the Sherman Act. 421 U.S. at 775, 95 S.Ct. at 2007. The defendants claimed "state action" immunity, contending that the Virginia State Bar was "a state agency by law." *Id.* at 790, 95 S.Ct. at 2014. The Court concluded:

> "It is not enough that * * * anticompetitive conduct is 'prompted' by state action; rather anticompetitive activities

> must be compelled by direction of the State acting as a sovereign." *Id.* at 791, 95 S.Ct. at 2015.

To the same effect is the Court's earlier decision in *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 706–07, 82 S.Ct. 1404, 1414, 8 L.Ed.2d 777 (1962).

And in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Court ruled that, even though the defendant utility was subjected to pervasive regulation by the Michigan Public Service Commission, which had specifically approved its tariff providing that the utility would replace for its customers free of charge their burned-out light bulbs, this practice was not immune from antitrust attack. The Court explained:

> "Respondent could not maintain the lamp-exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's." *Id.* at 594, 96 S.Ct. at 3119.

Likewise, in the present case, although the tariffs in question were filed at the direction of federal, state or local regulatory agencies, and could not be changed without agency approval, the idea of preventing the interconnection of customer-supplied terminal equipment without a Bell-supplied interface device originated with AT&T. Moreover, unlike the tariff in *Cantor*, the interface device requirement was never specifically approved and was ultimately found by the FCC to be unreasonable and illegal.

By no stretch of meaning can the interface-device requirement be deemed to have been "compelled" by the regulatory agencies, even though the filing of *some* tariff was. The "State Action" doctrine accordingly does not shield defendants' actions from the reach of the antitrust laws.

PRIMARY JURISDICTION

[7] The Court rejects Magistrate Sinclair's alternative recommendation, that this action should be stayed pending determination of the issues in the first instance by the FCC under the principle of primary jurisdiction.

In *United States v. R.C.A., supra,* the Court explained the rationale underlying the principle:

> "The doctrine originated with Mr. Justice (later Chief Justice) White in *Texas & Pacific R. Co.v. Abilene Coton Oil Co.,* 204 U.S. 426, [27 S.Ct. 350, 51 L.Ed. 553]. It was grounded on the necessity for administrative uniformity, and, in that particular case, for maintenance of uniform rates to all shippers. A second reason for the doctrine was suggested by Mr. Justice Brandeis in *Great Northern R. Co. v. Merchants Elevator Co.,* 259 U.S. 285, 291 [42 S.Ct. 477, 66 L.Ed. 943] where he pointed to the need for administrative skill 'commonly to be found only in a body of experts' in handling the 'intricate facts' of, in that case, the transportation industry." 358 U.S. at 346, 79 S.Ct. at 464 (footnote omitted).

The expressed basis for Magistrate Sinclair's recommendation that the principle be applied in this case is that the FCC has "special expertise, a vast compendium of knowledge" (p. 242) in the relevant areas, and "[i]n order to preserve the regulatory scheme, the agency should be given the opportunity to interpret its owns rules and regulations" (p. 244), thereby reducing the possibility of inconsistent results among the "welter" of cases presenting the same issues.

The Court concludes that this case is not a proper one for referral to the FCC for the reason that the FCC has already employed its expertise in deciding the principal issue with respect to which that expertise was needed: whether the interface device requirement was fair and reasonable.

The only other issues with respect to which the FCC's special expertise might be advantageous are (1) whether the data supplied to the FCC, in an attempt to justify the interface device requirement, were false and misleading; and (2) whether the Bell terminal equipment was predatorily underpriced.

However, neither of these issues is beyond the understanding of laymen. Moreover, there is no assurance that the FCC would choose to resolve the issues nor, if they did, any way of predicting how long it would take. Based on experience with the post-*Carterfone* tariffs, it appears unlikely that the FCC would reach a decision for several years at least. The present case has already been pending for over three and one-half years, during which time intensive trial preparations have been pursued so that the case is almost ready for trial. Any further substantial delay would disserve the interests of justice.

Insofar as concerns the possibility of conflicting results, defendants have achieved no apparent success in persuading any of the other courts to refer the issues to the FCC. It thus appears that, even if this Court should make such a reference, the possibility of inconsistent results will still exist.

Finally, there is one problem which is not addressed by any of the parties in their briefs, nor treated in any of the decisions they have cited: plaintiffs have demanded a jury trial of all the issues. If the FCC's findings are treated as preclusive, or even if they are admissible in evidence, it appears that substantial Seventh Amendment questions will be raised.

The Court concludes that, on balance, the advantages of referral to the FCC are outweighed by the disadvantages.

CONCLUSION

Defendants' motion is denied in its entirety, and defendants' request for certification of the question to the Court of Appeals under 28 U.S.C. § 1292(b) is also denied.

SO ORDERED.

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APPENDIX C

District Court's Opinion Denying Motion For A Judgment Notwithstanding The Verdict Or For A New Trial

LITTON SYSTEMS, INC., et al., Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants.

NEW YORK TELEPHONE COMPANY, et al., Counterclaimants,

v.

LITTON SYSTEMS, INC., et al., Counterdefendants.

LITTON SYSTEMS, INC., Plaintiff,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.

Nos. 76 Civ. 2512(WCC), 77 Civ. 3720(WCC).

United States District Court, S. D. New York.

Sept. 28, 1981.

Howrey & Simon, Washington, D. C., Peter E. Fleming, Jr., Curtis, Mallet-Prevost, Colt & Mosle, New York City, for plaintiffs-counterdefendants; William Simon, John W. Nields, Jr., Washington, D. C., of counsel.

Dewey, Ballantine, Bushby, Palmer & Wood, New York City, for defendants-counterclaimants; Leonard Joseph, Harvey Kurzweil, J. Paul McGrath, Peter H. Jacoby, New York City, of counsel.

OPINION AND ORDER

CONNER, District Judge:

Defendants have moved for judgment notwithstanding the jury verdict rendered June 29, 1981 and the Court has fully considered the extensive memoranda filed by the parties in support of and in opposition to the motion. Substantially all of the points now urged by defendants were raised and argued on the same grounds before and/or during the trial. Upon reconsideration, the Court reaffirms its previous rulings on each of these points. Even if some of the rulings were incorrect, it appears unlikely that they affected the jury's verdict. Because the Court's reasons for each of the challenged rulings were adequately, albeit generally informally, expressed, no further discussion appears warranted at this time.

The motion is denied.

SUPPLEMENTAL ORDER

Supplementing the Court's Order dated September 28, 1981, denying defendants' motion for judgment notwithstanding the jury verdict rendered June 29, 1981, the Court also denies, *nunc pro tunc,* defendants' alternative motion for a new trial.

SO ORDERED.

APPENDIX D

Order Of Court Of Appeals Denying Petition For Rehearing, With Suggestion For Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirty-first day of March, one thousand nine hundred and eighty-three.

LITTON SYSTEMS, INC., ET AL., Plaintiffs-Appellees, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., Defendants-Appellants.	Nos. 81-7598, 7766, 7776, 7778, 7856

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, American Telephone and Telegraph Co., et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

By /s/ Francis X. Gindhart

Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX E

Excerpts From The Trial Record

EXCERPTS FROM AT&T's COMMENTS IN DOCKET 19258 (BB2V 1128–1308)

COMMENTS OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY

American Telephone and Telegraph Company (AT&T) respectfully submits the following comments in response to the Commission's First Supplemental Notice of Inquiry and Rule Making herein.[1]

I. INTRODUCTION

Issues Presented

1. In this proceeding the Commission has requested "comments on certain proposals submitted recently to the Commission recommending the establishment of programs for technical standards and enforcement thereof that, if adopted, would expand the options available to customers" for the [1129] connection of customer-provided equipment or systems to the nationwide telephone network.[2]

2. Questions of fundamental importance to the future of telecommunications service to the public in this country are presented herein. The Commission stated when it initiated this docket, "[o]ur proceeding herein is concerned with . . . whether, and to what extent, there is a public need for us *to go beyond* what we ordered in *Carterfone* and permit customers to provide, in whole or in part, the aforementioned NCSU's and CA's. . . ."[3] (Empha-

[1]40 F.C.C.2d 315 (1973). The date for filing comments, originally set for June 15, 1973, was extended by various orders to October 17, 1973. See Order of Chief, Common Carrier Bureau, No. 06261, released September 5, 1973, herein.

[2]40 F.C.C.2d 315, para. 1.

[3]35 F.C.C.2d 539 at 542 (1972). NCSU refers to Network Control Signaling Unit and CA refers to Connecting Arrangement.

sis supplied.) The issues stated by the Commission raise other far-reaching issues which can have a drastic impact on the public interest. These issues should be set out clearly and confronted directly. They are so basic to the particular certification proposals now before the Commission that those proposals cannot properly be considered without at the same time passing on these issues.

3. The issues raised relate not only to the feasibility of the certification proposals being considered by the Commission herein, but also relate to the interconnection of customer-provided terminal equipment generally. First, issues are presented relating to the regulatory authority of the state commissions as well as this Commission over interconnection [1130] generally, and, more particularly, over the certification questions presented herein. Second, issues are presented as to the impact of the interconnection of customer-provided terminal equipment and the potential impact of the adoption of the certification proposals upon the quality and cost of telephone service to the using public. In particular, an issue which must be addressed herein is the consequences in terms of the quality and cost of service of permitting non-common carriers to supply basic elements essential to the provision of communications services. Questions raised include the following:

(a) Is there a significant risk that the changes implied in the Commission's questions will adversely affect the quality and cost of the nation's telephone service?

(b) If such changes were permitted, who would then be responsible for the quality and cost of telephone service used by the public? Is it to be the regulated telephone companies? If so, what redefinition of their responsibilities is required? Is public understanding of that redefinition possible? If it is to be the regulatory commissions, how will they carry out such responsibility as to unregulated suppliers and users of equipment? Or will no one be responsible for quality of service in that area, thus leaving, in the future, the quality of service to chance?

(c) Will the elimination of the requirement for a telephone company-provided CA result in cheaper or better telephone service for the American public as a whole? Or will it benefit a few at the expense of many?

(d) What shift in revenue requirements may result from the changes implied in the Commission's two questions? And is such a shift in the public interest?

(e) If the evidence shows that the suggested changes will cause telephone service to cost more for most users and will cause service to be of lower quality, is the promotion of further competition in the terminal equipment area of such overriding public interest that lower quality and higher costs of telephone service should be imposed on the American public?

Third, the impact of interconnection and certification upon the innovative process in the telephone industry must be considered. Fourth, the technical, engineering, operational and administrative impact of the particular certification proposals must be evaluated. Fifth, the costs associated with these proposals must be determined.

Statement of Position

4. We believe that it is not in the public interest to permit customers the option of providing their own NCSUs or CAs or that "there is a public need . . . to go beyond" *Carterfone*. We believe that the people of this country have been well served—and will be best served—by the concept that has provided it with the most highly developed communications service in the world. That concept, known as the common carrier principle, requires a universal system designed and configured to operate as a single integrated entity, with end-to-end services available on equitable terms to all its users. Further we believe that these services are so affected with the public interest as to require that they be provided by common carriers subject to continuing public regulation.

5. We believe that there will be certain adverse consequences upon the quality and cost of telephone service from the impact of both the interconnection of customer-provided equipment and the adoption of these certification proposals. The public interest, construed, as it must be, as the widest availability of high quality communication at the lowest overall cost to all users, will inevitably be impaired by the duplication of facilities and the division of responsibility that will ensue from further interconnection in an industry where compatibility of components and precise coordination of process are crucial. Interconnection has had an adverse impact on the innovative process in the telephone industry and the impact of certification would be even more detrimental.

6. As to the particular certification proposals now before the Commission, we do not believe that they should be either adopted or implemented. Such proposals, and indeed any program of certification would, in our view, inevitably lead to the uncontrolled connection of customer-provided equipment to the telecommunications network. The ability to allocate responsibility for network performance would perforce be destroyed. Regulatory control and the quality of service would be diminished. These certification proposals are incomplete and inadequate. As structured, they are complex, cumbersome and impractical. In actual operation, the complex structure with its division and dispersal of responsibility which is necessarily inherent in any such program would cause a gradual deterioration in the effectiveness of any such program. Clearly, an ineffective program is not acceptable. Moreover, there are no apparent cost advantages to certification for the ultimate user of customer-provided equipment. The costs of protecting the network must be paid one way or the other. While certification diffuses the costs of network protection, it does not reduce them.

7. In the consideration of the issues herein, it must be kept in mind that regulation of terminal equipment and connection there-

to, or replacement thereof, has clearly been left to the state and local authorities. The Communications Act and its legislative history lead to that conclusion. Also, the present interstate and intrastate tariffs reflect that Congressional determination. The certification proposals being considered by the Commission herein are clearly matters of local concern. The Commission's authority over the matters at issue herein is limited and adoption by it on a preemptive basis of any of the certification proposals would be an unlawful encroachment upon state and local regulatory authority.

* * *

26. Telephone company control of—and concomitant responsibility for—all the facilities used in rendering service is most desirable. Connections of customer-provided terminal equipment, whereby equipment formerly provided by the telephone companies is replaced by such interconnections, has two major adverse consequences. First, to the extent the Commission adopts proposals, such as those before it in this proceeding, which permit replacement of equipment not controlled by the telephone companies, the quality and cost of service to all users will be adversely affected. As noted below, present interconnection policies and practices to some extent have already had this effect. Certainly, any loosening of these policies can only serve to exacerbate this situation. By its very operation, connection of customer-provided equipment as defined above will result in divided responsibility for the quality of service and operation of the network. The demonstrated ability to restore communications facilities in times of emergency and disaster will be affected. The telephone companies' ability to innovate will be impaired. Second, connection of customer-provided equipment will impact upon the prices and price structures for communications services described above. Such connections change those traditional relationships. The replacement of telephone company-provided terminal equipment by customer-provided terminal equipment will upset the balance

between interstate and intrastate services achieved under present jurisdictional separation formulas. Also, competition in this area will force price changes which will eliminate the public benefits derived from existing price structures.

27. Thus, we believe it is essential in evaluating the proposals now before it—and similar ones which would permit the provision of integral parts of the network by non-common carriers—that this Commission consider most carefully whether such high quality, low cost universally available basic service could be provided if responsibility for the provision and operation of the network were divided among a number of suppliers. In our view, replacement by customers of essential equipment now provided by the telephone companies would impair the "end-to-end" service concept and the benefits of that concept which have been achieved, and is therefore undesirable. The impact of a departure from this proven concept on the quality of service and the costs thereof cannot be ignored.

28. The *Carterfone*[4] case led to new approaches to the connection of customer-provided equipment to the network. We opposed that decision because of our concern for the adverse effects that interconnection of customer-provided equipment would have on the quality of service provided to the public. The post-*Carterfone* tariff filings represented our best efforts to open the network to the connection of customer-provided equipment consistent with certain network and employee protective requirements. However, experience since then has served only to reinforce our earlier views. Certainly, nothing in our experience would support a "need . . . to go beyond . . . *Carterfone* and permit customers to provide, in whole or in part . . . NCSU's and CA's . . ."[5]—one of the central issues to be considered herein. Indeed, problems have been experienced which indicate that interconnection in any form

[4] 13 F.C.C.2d 420 (1969).

[5] 35 F.C.C.2d 539 at 542 (1972).

tends to degrade the quality of service and to increase the costs of service to all users.

29. The tariff provisions relating to the connection of customer-provided equipment provide only minimal protection of network services and telephone personnel from certain harms caused by such connections. The vulnerability of the network to technical harms, and the ways in which customer-provided equipment cause harm to the network have been firmly established.[6] Likewise, the need for protection of the network from uncontrolled interconnection has been widely accepted. Indeed, the Commission's actions in establishing the various advisory committees and its directions to those committees[7] implicitly recognize the need for protection—at least from the harms as discussed by the NAS Panel.

30. The specific harms discussed by the NAS Panel are, however, only a limited aspect of the problem. As previously mentioned, overall quality of service is a vital area of concern. The performance and transmission characteristics of customer-provided equipment which replaces basic telephone company equipment is a matter of concern not only to the user of that equipment but also impact on the quality of service rendered to all users. End-to-end service, both its quality and cost, is not adequately protected by today's regulations permitting such connections, nor is it adequately protected in any of the proposals which have been submitted. The ability to restore service in time of natural disaster or for reasons of national defense is also affected.

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[6]"Report of a Technical Analysis of Common Carrier/User Interconnections" (the NAS Report) made by the Special Panel on Common Carrier Interconnection of the National Academy of Sciences' Computer Science and Engineering Board (the NAS Panel) which was released by the Commission with its Public Notice 51094, dated July 1, 1970.

[7]PBX Interconnection, Advisory Committee, 28 F.C.C.2d 403 (1971); Answering Devices, 33 F.C.C.2d 526 (1972).

31. It is often argued that the impact on the quality of service of the interconnection of customer-provided equipment is merely potential and not real or actual. This is simply not true. In fact, our experience is clearly to the contrary. For example, current studies indicate that intercity private line serving links equipped with at least one customer-provided terminal generated trouble reports at a rate at least 50 percent higher than did serving links equipped with telephone company-provided terminals only. The studies now in progress on message telephone lines are showing like results—the trouble report rate for lines equipped with customer-provided terminals is more than 25 percent higher than lines connected solely to telephone company-provided terminals. As we have previously reported to this Commission with respect to interstate voice grade private line data services, where the same minimum protection criteria apply as on the public switched telecommunications network, a sizable percentage (8.5 percent) of the customers utilizing their own data transmitting equipment were applying signal power in excess of the established network protective criteria, thereby degrading the service of other customers. The same survey showed, in the case of a particular type of connection or interface which is comparable to that encountered on public switched network services, that 18 percent of the customer-provided terminals violated the minimum network protection criteria by a substantial degree.

32. Complete and exhaustive statistics demonstrating all the harms from uncontrolled interconnection or the total impact on the quality of service might not be obtainable, given the nature of the problem studied. Certain effects simply are not measurable. How many wrong numbers[a] or how much crosstalk occurs from the use of customer-provided terminals can only be observed at the time of or during their occurrence. The difficulties in making such measurements are apparent. However, the data cited above

[a]The fact is that an increase of but one percent in ineffective calling attempts will add about $75 million to the capital costs of the network and about $27 million to the annual operating expenses.

are sufficiently consequential to suggest that interconnection has an adverse impact on the quality of service. Certainly, for the reasons set forth in these comments, further loosening of interconnection policies, such as customer options embodied in the certification proposals before the Commission in this proceeding, is not in the public interest and should not be adopted.

* * *

BELL'S PROPOSED INSTRUCTIONS

Defendants' Proposed Instruction No. 27A*

EXERCISES OF FIRST AMENDMENT RIGHTS ARE NOT VIOLATIONS OF SHERMAN ACT

Bell takes the position that a great many of the actions which Litton claims are violations of the Sherman Act are not prohibited or covered by that Act because they implicate the exercise by Bell of rights guaranteed them by the First Amendment to the Constitution of the United States.

Under the First Amendment, both persons and corporations have an absolute right to act together to petition the government for redress of grievances. Under the First Amendment, they also have the right to speak freely on matters of public concern, without fear of prior restraint or subsequent punishment.

The right to petition the Government for redress of grievances, either jointly or singly, covers all instances where persons or corporations genuinely seek to bring about the action of some branch of government, federal or state, in their favor. That right includes the right to go to court—either to bring a lawsuit, to defend a lawsuit, or to intervene in lawsuits brought by others. It further protects the right to go to administrative agencies, such as the Federal Communications Commission or state regulatory agencies, to seek the adoption of new regulations or the repeal of old ones, to institute proceedings, to defend proceedings, and to intervene in proceedings instituted by others. Finally, that right covers the filing of tariffs with the FCC and state commissions, since the filing of such tariffs is a necessary step to secure their approval by the government agency.

Many of these actions, if successful, might be harmful to a competitor, and they may have been undertaken with the intent to injure or harm a competitor. Nevertheless, the First Amend-

ment guarantees that Bell may participate in genuine efforts to influence the passage or enforcement of laws or government regulations, regardless of its intent in doing so, and without prior restraint or fear of subsequent punishment. The reason why such actions are not covered by the Sherman Act is that the Supreme Court held that Congress could not have intended to inhibit or restrict the exercise of constitutional rights in passing that Act. Therefore, as I shall instruct you later, you may not consider Bell's exercise of these constitutional rights to come within, or to constitute a violation of or evidence of a violation of, the Sherman Act.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510–12, 515 (1972)); *United Mine Workers v. Pennington,* 381 U.S. 657, 670 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 136, 144 (1961); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers,* 542 F.2d 1076, 1082 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977); *Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F.2d 220, 227–28, 231 (7th Cir. 1975).

Defendants' Proposed Instruction No. 27C*

EFFORTS TO INFLUENCE PUBLIC OFFICIALS

As I told you a moment ago, a concerted and genuine effort to influence public officials does not violate the antitrust laws, regardless of intent or purpose. Therefore, with respect to the specific conduct challenged by Litton, you may not base a finding that Bell violated the antitrust laws upon such efforts to influence public officials, whether the officials are legislators, regulators, judges, or members of the executive branch.

Efforts to influence public officials do not violate the antitrust laws, even if they are intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the antitrust laws.

United Mine Workers v. Pennington. 381 U.S. 657, 670 (1965); *Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1384 (5th Cir.), *cert. denied,* 101 S.Ct. 286 (1980); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd.*, 542 F.2d 1076, 1082–83 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977).

Defendants' Proposed Instruction No. 28*

REGULATION AND THE RULE OF REASON

I told you earlier that you should consider the effect of federal and state regulation on the issue of whether Bell had monopoly power. If you find that Bell did not have monopoly power, you must return a verdict for Bell on the monopolization claim. Even if, however, you find that Bell did have monopoly power, Litton must still show that Bell willfully maintained its monopoly power by predatory or anticompetitive conduct. You should consider the effect of federal and state regulation on that question. Put another way, under the rule of reason, which I will explain in a moment, you should consider the effect of regulation in deciding whether Bell acted properly and reasonably or acted in a predatory or anticompetitive manner.

As we come to each category of challenged conduct, I will give you specific instructions on the regulatory framework applicable to that conduct. You have heard a great deal of evidence on the activities of the FCC and state regulatory agencies regarding much of Bell's challenged conduct. For now, I will tell you that to the extent Bell's conduct reflected an effort to comply with what Bell reasonably believed to be regulatory policies or obligations, you should not find such conduct predatory or anticompetitive.

In other words, if you find that Bell took certain actions because it reasonably believed those actions were required or were consistent with regulatory policies which promoted the public interest, you must find those actions reasonable and lawful.

This is because it would be unfair to penalize Bell under the antitrust laws for conduct that Bell reasonably thought was consistent with its obligations under federal and state regulatory laws and decisions. On the other hand, you should bear in mind that the reasonableness of Bell's conduct is not to be determined by regulatory decisions made after the conduct occurred. The controlling question is whether Bell's belief was reasonable in light of the regulatory context in which it was operating at the time of the action.

United States v. Marine Bancorporation, Inc., 418 U.S. 602, 627 (1975); *Silver v. N.Y. Stock Exchange*, 373 U.S. 341, 360–361 (1963); *Mid-Texas Communications v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1389–91 (5th Cir.), *cert. denied*, 101 S.Ct. 286 (1980); *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 354 (5th Cir.), *cert. denied*, 101 S.Ct. 208 (1980); *International Tel. & Tel. Co. v. General Tel. & Elec.*, 518 F.2d 913, 935–936 (9th Cir. 1975); *Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237–1239 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

See Defendants' Pretrial Memorandum at 61–66.

Defendants' Proposed Instruction No. 31*

INTERCONNECTION

Litton's first specific charge of predatory or anticompetitive conduct is in the area of interconnection. You have heard a great deal of evidence on the tariffs Bell filed after the *Carterfone* decision in 1968. These tariffs, as you know, permitted the interconnection of customer-provided equipment only through a so-called protective connecting arrangement, or "PCA", provided, installed, and maintained by the telephone companies. The parties do not dispute the contents of these tariffs; but they do disagree on whether or not these tariffs were reasonable. Litton contends that the PCA tariffs were filed in bad faith, were unnecessary to protect the telephone network from alleged harms threatened by un-

restricted interconnection, and were therefore unreasonable. Bell argues that the tariffs were a reasonable way of protecting the telephone network from these harms, and were therefore reasonable in light of all the circumstances. The question for your decision is whether Litton has proved by clear and convincing evidence that Bell's PCA tariffs were not at the time within the range of reasonable means of protecting the telephone network.

In deciding whether Litton has proved that by filing these tariffs Bell acted in a predatory or anticompetitive manner under the rule of reason, you must consider the effect of regulatory policy on Bell's decision. Bell has introduced evidence on its obligation to protect the efficient operation of the telephone network, its concern about the risks of various types of network harm from uncontrolled interconnection, the historical regulatory policy against interconnection, and the need for prompt action to protect the network in the wake of *Carterfone*. Litton, on the other hand, has offered evidence that Bell allegedly knew the PCA was technically unnecessary, but filed the tariffs because they would provide a competitive barrier.

Bell contends that its decision not to file tariffs which would have allowed unlimited interconnection was based on a reasonable belief that such tariffs would have been contrary to the public interest. If you find that Bell's PCA tariffs reflected a reasonable effort to protect the telephone network or to comply with what Bell reasonably believed to be regulatory policy, then you must find that filing and enforcing these tariffs was not predatory or anticompetitive conduct. In other words, if you find that Bell's purpose in filing these tariffs was to protect what it reasonably believed to be the public interest as defined by regulatory policy, then you must find Bell's conduct proper and reasonable. This is true whether or not the PCA was actually necessary; all that is required is Bell's reasonable belief that it was necessary. Even if you are not persuaded that Bell sought to protect the public interest

Litton still has the burden of proving that the conduct was predatory or anticompetitive.

In making this decision, you should consider all the evidence you have heard concerning the activities of state and federal regulatory bodies on interconnection both before and after the *Carterfone* decision.

Mid-Texas Communications v. American Tel. & Tel. Co., 615 F.2d 1372, 1389–90 (5th Cir.), *cert. denied*, 101 S.Ct. 286 (1980); *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 354 (5th Cir.), *cert. denied*, 101 S.Ct. 208 (1980); *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040 (D. Conn. 1980); *Town of Massena v. Niagara Mohawk Power Corp.*, 1980–2 Trade Cas. (CCH) ¶ 63,526 (N.D.N.Y. 1980). *See MCI Communications Corp. v. American Tel. & Tel. Co.* (N.D. Ill. 1980), Jury Instructions, at 11,467; Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 577–79 (1977).

See Defendants' Pretrial Memorandum at 15-26.

BELL'S WRITTEN OBJECTIONS TO THE DISTRICT COURT'S DRAFT INSTRUCTIONS

* * *

Effect of Federal and State Regulation (pp. 22–23)

Defendants object to this proposed instruction for six reasons.

* * *

(a) The instruction improperly implies that despite regulation, the application of the Sherman Act is not at all modified with respect to the furnishing of business telephone terminal equipment to customers (p. 22).

(b) The jury should be instructed that to the extent Bell's conduct reflected an effort to comply with what Bell reasonably believed to be regulatory policies or obligations, such conduct should not be found predatory or anticompetitive. *See* defendants' proposed instruction 28; *Mid-Texas Communications Systems,*

Inc. v. American Tel. & Tel. Co., 615 F.2d 1372, 1389-91 (5th Cir.), *cert. denied,* 101 S. Ct. 286 (1980).

* * *

Litton's Specific Claims (pp. 24-26)

* * *

(c) Plaintiffs' claim for damages as a user of the PCA should be dismissed as a matter of law under 1) the *Keogh* or "filed tariff" doctrine. . . .

* * *

First Amendment Protections; the Bad Faith Exception (pp. 41-43)

(a) Defendants contend that there is insufficient evidence to go to the jury on the issue of whether the challenged conduct falls within the sham exception as defined in this instruction.

(b) The proposed instruction does not make it clear that the right to petition applies regardless of any anticompetitive intent Bell may have had—the only issue under the sham exception is whether Bell truly wanted the government action sought and did not lie to the FCC about it.

Interconnection/Opposition to Registration (pp. 44-45)

(a) The questions for the jury's decision contained in this instruction are inconsistent with the previous instruction on the right to petition. The jury must first find that Bell's filing of the PCA tariffs falls within the sham exception. If the jury so finds, then it must decide the reasonableness issue. The same defect is contained in the proposed instruction on opposition to registration, with an additional error in that Bell's purpose in opposing registration is legally irrelevant under *Noerr-Pennington.*

* * *

EXCERPTS FROM DISTRICT COURT'S INSTRUCTIONS AND TRANSCRIPT (18012-18241)

Effect of Federal and State Regulation

* * *

There are several parts to the Bell System defendants' business. One part is the central station or central switching network, which, to the extent it's local in nature, is a lawful monopoly not subject to the Sherman Act.

Another part of the business is the making and furnishing of telephone terminal equipment, including PBX and key systems, to customers. With respect to this latter part of the business, the Bell System defendants are subject to the requirements and obligations of the Sherman Act.

While certain aspects of this part of the defendants' business are subject to regulation by the states, it has been held by the courts that state regulation does not immunize defendants' conduct from the Sherman Act unless that conduct is ordered by a state regulatory agency pursuant to state legislative directive and not merely permitted by state regulation.

Further, state regulatory agencies may not restrict the use or requirements for the use of telephone terminal equipment from one state to another, even though that equipment is also used in making local and intrastate calls.

Although regulation does not provide Bell with immunity from the antitrust laws in the telephone terminal equipment market, regulation is one factor you should consider in determining the purpose and reasonableness of the defendants' acts and practices.

* * *

LITTON'S SPECIFIC CLAIMS

* * *

I will now instruct you on the specific alleged practices by which Litton claims Bell maintained its alleged monopoly power in the relevant market.

INTERCONNECTION TARIFFS

Bell's first specific charge of predatory or anticompetitive conduct is in the area of interconnection. You have heard a great deal of evidence concerning the tariffs which Bell filed after the *Carterfone* decision in 1968. These so-called post-*Carterfone* tariffs, as you know, permitted the interconnection of customer-provided equipment only through a so-called interface device or protective connecting arrangement, or PCA, which was provided, installed and maintained by the telephone companies. The parties do not dispute the contents of these tariffs, but they do disagree on whether or not the tariffs were reasonable.

* * *

The question for your decision is whether Litton has proved that Bell's PCA tariffs were filed in bad faith. In determining that question, you may consider whether Bell knew or should have known at the time that the interface device was not a reasonable means of protecting the telephone network because the establishment of standards for competitive terminal equipment was a practical method of affording such protection.

OPPOSITION TO REGISTRATION

You have also heard about Bell's opposition to proposals made before the FCC that the PCA tariffs be replaced by various programs of certifying or registering equipment with the FCC. The question for your decision is whether Bell's opposition was interposed in bad faith for the purpose of excluding competition or

whether Bell took this position because it believed that the registration proposals being made were not in the public interest and would not provide sufficient protection to Bell System employees, customers and the telephone network.

THE LEAST RESTRICTIVE ALTERNATIVE

As a general proposition, the Sherman Act imposes no obligation on a public utility to propose tariffs which are the least restrictive to competition. The test is whether Bell's conduct was reasonable at the time under all the circumstances or whether it was predatory and anticompetitive. You therefore must consider whether the tariffs were reasonable in light of all the circumstances at the time, weighing the need for protection of the network against the costs to the customer and the effects on competition.

In considering the effects on competition, you may take into account the availability of the interface devices, including the length of time it would take to design and manufacture these devices for all of the different types of competitive terminal equipment, the cost of the interface devices relative to the cost of the terminal equipment, and the difficulties of promulgating and enforcing certification standards.

FIRST AMENDMENT PROTECTION AND THE BAD FAITH EXCEPTION

Certain categories of alleged predatory or anticompetitive conduct by Bell, including the filing and defense of tariffs and opposition to registration involve activities which Bell contends are protected by the First Amendment to the United States Constitution. In deciding whether or not Bell's conduct in these two areas was predatory or anticompetitive and thus whether it amounted to wilful maintenance of monopoly power, you must keep in mind that certain types of conduct are indeed protected by the First Amendment and cannot form the basis for an antitrust violation.

Under the First Amendment, both persons and corporation have a right to act either individually or jointly in petitioning the government for redress of grievances. Under the First Amendment they also have the right to speak freely on matters of public concern without fear of prior restraint or subsequent punishment.

The right to petition the government for redress of grievances, either jointly or singly, covers all instances where persons or corporations seek in good faith to bring about the action of some branch of government, federal or state, in their favor. That right includes the right to go to court, either to bring a lawsuit or to defend one, or to intervene in lawsuits brought by others. It further protects the right to go before administrative agencies, such as the Federal Communications Commission or state regulatory agencies, to seek the adoption of new regulations or the repeal of old ones, to institute proceedings, to defend proceedings and to intervene in proceedings instituted by others.

Many of these actions, if successful, might be harmful to a competitor. Nevertheless, the First Amendment guarantees that persons or corporations may participate in good faith efforts to influence the passage or enforcement of laws or government regulations or to influence public officials regardless of whether the results of the government action they seek would be harmful to competition.

The reason why such actions are not covered by the Sherman Act is that the Supreme Court has ruled that Congress, in passing that act, could not have intended to inhibit the freedom to petition the government guaranteed by the First Amendment or to interfere with the constitutional framework of representative government.

You are also instructed that petitioning an administrative agency such as the FCC or seeking review in the courts may result in delays because administrative or judicial procedures are often

time consuming. Creating such delays does not constitute wilful exercise of monopoly power as long as the petition or application to the courts is based on a good faith interest in influencing the agency or obtaining a court ruling.

However, there is an exception to the general rule that efforts to influence public officials do not violate the antitrust laws, and that is the so-called sham or bad faith exception. If a campaign, ostensibly directed toward influencing government action, is a mere sham or artifice to cover what is essentially nothing more than an attempt to smother competition by a pattern of knowingly filing baseless claims or making misrepresentations to administrative agencies in a way designed to deprive competitors of meaningful access to those agencies, the First Amendment protections are lost and the Sherman Act applies.

In considering whether Bell's filing of tariffs or opposition to registration constituted wilful maintenance of monopoly power, therefore, you must decide whether or not they fall within the bad faith exception as I have just explained it to you.

* * *

THE CLERK: Madam Foreperson, has the jury agreed upon a verdict?

THE FOREPERSON: We have.

THE CLERK: Claim one, monopolization Question number 1: Did defendants possess monopoly power in a relevant market? Your answer, please.

THE FOREPERSON: Yes.

THE CLERK: Question number 2: If so did defendants wilfully maintain such monopoly power by predatory or anti-competitive conduct? Your answer, please.

THE FOREPERSON: Yes.

THE CLERK: Question number 3: If so, was such wilful maintenance of monopoly power a proximate cause of injury to plaintiffs? Your answer, please.

THE FOREPERSON: Yes.

THE CLERK: Claim 2, attempted monopolization. Question number 4: Did defendants have a specific intent to obtain monopoly power in a relevant market? Your answer?

THE FOREPERSON: Yes.

THE CLERK: Question number 5: If so, did defendants attempt to obtain such monopoly power by anti-competitive or predatory conduct? Answer, please.

THE FOREPERSON: Yes.

THE CLERK: Question number 5: If so, was there a dangerous probability that defendants would succeed in obtaining such monopoly power? Your answer please.

THE FOREPERSON: Yes.

THE CLERK: Question number 7: If so was such attempt a proximate cause of injury to plaintiffs? Your answer.

THE FOREPERSON: Divided.

THE CLERK: Claim number 3, conspiracy to monopolize. Question number 8: Did AT&T and one or more of the Bell companies, acting as separate entities conspire or agree to monopolize a relevant market? Answer, please.

THE FOREPERSON: No.

THE CLERK: Question number 9: If so did these companies have the specific intent to maintain monopoly power in the relevant market? Your answer.

THE FOREPERSON: No.

THE CLERK: Question number 10: If so did any of the conspirators commit any overt acts in furtherance of the conspiracy?

THE FOREPERSON: No.

THE CLERK: Question number 11: If so was the conspiracy a proximate cause of injury to plaintiffs?

THE FOREPERSON: No.

THE CLERK: Claim number 4, conspiracy in restraint of trade. Question number 12: Did AT&T and one or more of the Bell companies, acting as separate entities conspire or agree to engage in conduct which unreasonably restrained trade? Answer?

THE FOREPERSON: No.

THE CLERK: Question number 13: If so, was any such conduct a proximate cause of injury to plaintiffs?

THE FOREPERSON: No.

THE CLERK: Go to question 14: What amount of money will fairly and reasonably compensate plaintiffs for the injuries they sustained to their telephone terminal equipment business as a proximate result of the violation or violations which you have found?

THE FOREPERSON: $91,990,000.

THE CLERK: Question 15: If you have found under any one or more of the four claims that the interface device requirement was a violation of the antitrust laws, what amount of money will fairly and reasonably compensate plaintiffs for the injuries they sustained by having to pay for the installation and monthly rentals of defendants' interface devices, as a proximate result of such violation?

THE FOREPERSON: $268,243.

THE CLERK: Question number 16: On which of the following alleged practices of defendants have you based your finding of predatory or anticompetitive conduct:

a. Filing of the interface device tariff in bad faith?

Your answer.

THE FOREPERSON: We are divided.

THE CLERK: b. Intentional delay in providing and installing interface devices?

THE FOREPERSON: Yes.

THE CLERK: c. Opposing certification in bad faith?

THE FOREPERSON: Yes.

THE CLERK: d. Intentionally providing unduly expensive, inefficient or unreliable interface devices?

THE FOREPERSON: No.

THE CLERK: e. Intentional pricing of PBX and key telephone services below incremental costs?

THE FOREPERSON: No.

THE CLERK: f. Discriminating against purchasers of competitive terminal equipment in the price of network service?

THE FOREPERSON: No.

THE CLERK: g. Misuse of information obtained through supplying of the interface devices to attempt to cause customers who have indicated their intention to purchase competitive equipment to lease Bell equipment instead?

THE FOREPERSON: No.

THE CLERK: h. Bad faith refusal to sell inside wiring at all or on a reasonable basis?

THE FOREPERSON: Yes.

THE CLERK: i. Bad faith delay in making cutovers?

THE FOREPERSON: We are divided.

* * *

APPENDIX F

***AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605 (1968)**

FCC 68-1234

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMERICAN TELEPHONE AND TELEGRAPH CO. (A.T. & T.)
"Foreign Attachment" Tariff Revisions in A.T. & T. Tariff FCC Nos. 263, 260, and 259

MEMORANDUM OPINION AND ORDER

(Adopted December 24, 1968)

BY THE COMMISSION: COMMISSIONER COX CONCURRING IN THE RESULT; COMMISSIONER WADSWORTH ABSENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

1. We have before us new tariffs and supporting papers filed recently by the American Telephone and Telegraph Co. (A.T. & T.) in behalf of itself and other telephone companies wherein it is proposed to effectuate significant changes in the foreign attachment provisions now appearing in certain tariffs of A.T. & T. These provisions govern the connection or attachment of customer-provided facilities to common carrier-provided facilities used in furnishing interstate or foreign communications services to the public. The particular services affected by these new tariffs are long-distance-message telecommunications service or message toll telephone service (tariff No. 263); private line service (tariff No. 260), and wide-area telecommunications service or WATS (tariff No. 259). The new tariffs are published to become effective, in part, on January 1, 1969, and, in part, on January 1, 1970. Appendix A hereof identifies the aforesaid new and revised schedules and supporting documents submitted by A.T. & T. In addition, we have before us a number of formal and informal pleadings and comments that have been submitted in response to the new tariffs. See appendix B.

2. Many of the responsive pleadings request us to reject, suspend, or investigate the new tariffs in whole or in part. Others submit comments and observations on the new tariffs without requesting any specific action by the Commission at this time. A.T. & T. urges us to permit the new tariffs to go into effect as scheduled without hearing or investigation. We believe that it will be useful to outline the salient features of the changes proposed by the new tariffs and the questions presented before stating our disposition of the matter before us.

I. Description of Changes

A.T. & T. TARIFF FCC NO. 263

3. The pleadings and comments are addressed principally to the new tariffs as they affect A.T. & T.'s tariff FCC No. 263. This tariff applies to the message toll telephone service, which is to be renamed "long-distance-message telecommunications service" under the new tariffs.

4. The nature of the changes proposed for A.T. & T. tariff FCC No. 263 will be more easily understood by making clear at the outset the nature of the service offered by the telephone companies under this tariff. This service utilizes the nationwide switched network of more than 2,000 cooperating telephone companies extending throughout the country. The network consists of (1) the telephone set, usually located on the customer's premises; (2) the pair of wires, or loop, and its supporting structures, which connect the telephone set to the central office; (3) the switching equipment in the central office; and (4) the trunk facilities that connect central offices to each other.

5. For years the tariffs on file with this Commission governing this service offering have made it clear that this service consists of the furnishing of facilities for the public to make interstate or foreign telephone calls between telephones, that is to say the service is now and has for many years been offered only as a complete service that includes the furnishing of the telephone itself with certain exceptions hereafter noted. Thus, the presently effective Tariff 263 states that the service offered thereunder "is that of furnishing facilities for telephone communication *between telephones* in different local service areas" and that the interstate and foreign toll charges shown in the tariff "are in payment for all service furnished *between the calling and called telephones*" (2.1.1(A)). (Our italic.)

6. With respect to the revisions in the message toll tariff, several important features emerge. First, the new tariffs would delete currently effective paragraph 2.6.1 which, in pertinent part, now reads as follows:

> No equipment, apparatus circuit or device not furnished by the telephone company shall be attached to or connected with the facilities furnished by the telephone company, whether physically, by induction or otherwise * * *.

Also they would delete currently effective paragraph 2.6.9 which begins with the following language:

> The provisions of paragraph 2.6.1 preceding shall not be construed or applied to bar * * *.

Second, in addition to canceling the above-cited paragraphs, the new tariffs would publish new provisions as follows:

> 2.6.1
> Customer-provided *terminal equipment* may be used with the facilities furnished by the telephone company, for long-distance-message telecommunications service, as specified in 2.6.2 through 2.6.6 following;
> 2.7.1
> Customer-provided *communications systems* may be connected with the facilities furnished by the telephone company for long-distance-message telecommunications service as specified in 2.7.2 through 2.7.10 following. (Our italic.)

7. As indicated above, the new tariffs will permit any kind of customer-provided terminal equipment (e.g., a computer) or customer-provided communications system (e.g., a private microwave system) to be attached to or connected to the telephone company facilities subject to the specifications set forth in the new tariff. Thus, an important feature of the revisions is the new set of conditions, referred to above, that are to govern the interconnection of such terminals and systems.

8. In the case of both customer terminals and systems, it will be the general responsibility of the customer to assure that his terminal or system shall not interfere with any of the services offered by the telephone company, nor endanger the company's employees or the public, or damage or change the company's equipment or facilities (2.6.2 and 2.7.2). Also in the case of both customer terminals and systems, all network control signaling functions are to be performed by equipment that is furnished, maintained, and installed by the telephone company (2.6.3 and 2.7.3), with exceptions. These exceptions, which have been in existence for some time, apply under limited conditions to systems of power, pipeline, and railroad companies, National Aeronautics and Space Administration, U.S. Army, Navy, and Air Force, and to systems or terminals of customers located in isolated, sparsely developed, hazardous, or inaccessible locations (2.7.4, 5, 6, and 7). Network control signaling is defined in the new tariffs as the transmission of signals used in the telecommunications system which perform functions such as supervision (control, status, and charging signals), address signaling (e.g., dialing), calling and called number identification, audible tone signals (call progress signals indicating reorder or busy condition, alerting, coin denominations, coin collect and coin return tones) to control the operation of switching machines in the telecommunication systems. The ordinary telephone set as used in the message toll service is a network control signaling unit.

9. The new tariffs divide customer terminals into three categories: Data transmitting or receiving equipment (data), voice transmitting or receiving equipment (voice), and accessories.

10. At the customer's option the aforementioned data terminals may be connected to the telephone company facilities either by direct electrical connection (i.e., physical connection of electrical conductors) or indirectly (i.e., acoustic or inductive connections). If the option is for direct electrical connection, the data customer has a further choice of (*a*) using either the telephone company's dataphone set, which performs not only the network control signaling functions but also the functions of a modem (modulation and demodulation of signals), or (*b*) using an interface called a data access arrangement, furnished by the telephone company, in lieu of the dataphone. Such an interface does not perform the modem function, so that this option allows the customer to provide his own modem rather than using that of the telephone company. If the customer's option is for a direct electrical connection through a data access arrangement rather than through a dataphone, then the customer's data terminal must meet certain technical criteria that are set forth in detail in appendix C hereof.

11. If instead of a direct connection, the data customer chooses to

connect his data terminal indirectly, he may do so by acoustic or inductive connections made externally to the telephone company's network control signaling unit. No telephone company interface is required therefore and no technical criteria are specified for such indirectly connected data terminals in the new tariffs published to be effective January 1, 1969. However, the new tariffs specify that, effective a year later, on January 1, 1970, the technical criteria for such indirectly connected data terminals shall be as shown in appendix D hereof.

12. The second, or voice, category of customer terminals may also be connected either directly or indirectly. If direct connection is used, such a terminal must use a telephone company interface called a connecting arrangement, and the terminal must meet the technical criteria set forth in appendix C hereof. If indirect connection is used, such connection must be made externally to the telephone company's network control unit. However no other interface is required and no technical criteria will apply until January 1, 1970. On and after that date the criteria shall be as shown in appendix D.

13. Accessories are customer terminal devices of a mechanical nature that do not involve electrical connection, directly or indirectly, to the telephone company facilities. These terminals are not subject to the technical criteria required for data and voice terminals, but are subject to the other requirements of the tariff applicable to all terminals.

14. Insofar as the interconnection of customer systems is concerned, the new tariffs impose the same technical criteria on these customer-provided facilities as apply to terminals. Thus, the new tariffs will permit either direct connection thereof through a connecting arrangement interface provided by the telephone company or through an indirect acoustic or inductive connection made externally to the telephone company's network control signaling unit. If a customer system is to be interconnected directly, it must meet the technical criteria set forth in appendix C. If it is to be connected indirectly by acoustic or inductive means, no technical criteria will apply until January 1, 1970, when the criteria shown on appendix D must be met.

15. A.T. & T. states that the purpose of the 1-year postponement of the technical criteria in appendix D for indirect connections is to give customers having acoustic or inductive devices that do not currently meet the new criteria additional time to accommodate themselves to these criteria.

A.T. & T. TARIFF FCC NO. 259

16. This tariff applies to wide-area telecommunications service or WATS. It is a voice grade service that is provided over the same nationwide switched network used for message toll service. The new and revised tariffs propose in substance to make the same revisions in WATS as outlined above for the message toll service.

A.T. & T. TARIFF FCC NO. 260

17. This tariff applies to private-line service. This is a separate service that does not use the switched telephone network. Changes com-

parable to those referred to above for message toll and WATS are not being proposed at this time for the private-line service. However, the private-line-service tariff is being revised, effective January 1, 1969, to make a new private-line offering whereby customers may obtain private lines of not more than 25 airline miles to connect their own voice-grade private channels to the telephone company message toll telephone network. These private-line facilities are called entrance facilities. They may not be used to connect a customer terminal or system to private-line facilities of the telephone company.

18. A.T. & T. has advised the Commission by letter dated December 6, 1968, that it expects to make further revisions in its private-line-service tariff comparable to those made in the message toll and WATS tariffs, shortly after January 1, 1969.

II. Questions Presented

19. As heretofore stated, the objections that have been filed are aimed principally at the revisions in the message toll tariff No. 263. The contention is made that these revisions do not comply with our *Carterfone* decision, *In the Matter of Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420, 14 FCC 2d 571. Objections are also made to the revisions in the WATS and private-line tariff for the same reason.

20. Accordingly the principal question raised by the pleadings and comments is whether the new and revised tariffs, in whole or in part, are in violation of our decision in *Carterfone*, and, if so, what action we should take with respect thereto. In addition, the question is raised as to whether, apart from compliance or noncompliance with *Carterfone*, there appear to be any other question of lawfulness that would warrant suspension, investigation, or action by the Commission at this time and, if so, the nature thereof.

III. Discussion

21. The contention is made that the new and revised message toll tariffs do not comply with our decision in *Carterfone* because the new filings bar the use of any customer-provided network control signaling units irrespective of whether they are harmful or harmless to the rest of the message toll telephone system. It is argued that such a bar is an *a priori* assumption of harm that we found in *Carterfone* to be unreasonable.

22. We believe that this particular objection is based upon a misconstruction of what we decided in *Carterfone*. We were concerned in that case with the lawfulness of tariff provisions that prohibit a customer from making harmless interconnection of his terminals or systems with the message toll telephone system of the telephone companies. As we have heretofore stated, this telephone system includes the telephone instrument which performs the network control signaling functions for message toll telephone service. We were therefore concerned with what could be connected or attached to this telephone system. Our decision in *Carterfone* does not hold that a customer may substitute his own equipment or facilities (whether it be

telephone instruments, loops, poles, or central office equipments) for that furnished by the telephone company in providing message toll telephone service as that service is defined in the tariff. Our decision dealt with interconnections and not replacements of any part of the telephone system. We emphasized this in our decision where we stated that "our conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operation or the telephone system's utility to others." 13 FCC 2d at page 424. In denying petitions for reconsideration we again made this clear by stating that "General has contended that the Commission has 'opened the door to customer ownership of telephone handsets.' The facts of this case did not involve the furnishing of purely telephone system equipment telephone-to-telephone on *the message toll telephone system*." 14 FCC 2d 571 at page 572. (Our italic.)

23. Although the tariff bar against any customer providing his own network control signaling unit is not in conflict with our *Carterfone* ruling, the question remains as to whether the telephone companies should make provision in their tariffs by which subscribers may have access to the so-called switched telephone network through the use of their own provided network control signaling equipment. On the basis of the pleadings and comments before us, we are in no position to determine the extent to which any such provision may be consistent with efficient and economic telephone service and otherwise in the public interest. In our opinion, these and other matters warrant further consideration by the Commission before it determines whether and what further action, if any, may be required. We believe that we will be in a better position to make these determinations after we have had a reasonable opportunity to closely observe the effects of the substantial changes now being effectuated by the telephone companies in their interconnection tariffs, the extent to which such changes satisfy reasonable requirements of their subscribers for data transmission and other communication services or facilities, and the implementation by the telephone companies of their representations that they are actively engaged in devising equipment and operating procedures to meet the expressed needs of customers for flexible access to the switched network. Thus, we will permit the tariff revisions to become effective as scheduled with the understanding that in doing so we are not giving any specific approval to the revised tariffs.

24. We are also instructing the chief of the Common Carrier Bureau to initiate promptly a series of informal engineering and technical conferences with the telephone industry and interested manufacturers, user groups, and Government agencies to ascertain what further changes are necessary, desirable, and technically feasible in the various tariff offerings of the telephone companies. It is our intent that these further informal proceedings shall be broad in scope and that they will provide a principal forum for the identification, examination, and, subject to Commission review, resolution of any questions presented by the tariff revisions. We are aware, for example, that there

are a number of unresolved specific questions, which we need not delineate herein, that are raised both in the pleadings and in the separate analysis of our own staff. These may require further action by the Commission. Some of these problems can reasonably be expected to be satisfied by further tariff amendments, such as additional revisions in the private-line tariffs which are scheduled to be made early in 1969, and provisions for unattended operation of a large variety of customer-data terminals, which provisions, according to the telephone companies' commitment, will become possible by the middle of 1969 when appropriate equipment and arrangements therefor will have been developed. Other tariff changes may be necessary or desirable, both of a substantive and clarifying nature, to respond to other questions that have arisen and that are likely to arise. Accordingly, the further proceedings will include, among other things, consideration of what changes, if any, should be made in the technical criteria and other conditions for interconnection and other matters of clarity and substance raised by the pleadings and comments. The staff will submit periodic reports to the Commission, with appropriate recommendations, and the Commission will be prepared to take such further action as it deems necessary or desirable to resolve outstanding issues.

25. We are of the opinion that the further informal procedures that we are here initiating, together with the information gained from the pending computer inquiry (docket No. 16979), will greatly assist the Commission in carrying out its statutory obligations herein. Through such procedures we expect to obtain valuable technical and operational information on a current and continuing basis and from a variety of sources that will aid us in our evaluation of the public interest factors involved in the new tariffs now being put into effect, as well as any new or revised tariffs that are expected to be proposed for the future or that may otherwise be required.

26. We will also welcome the cooperation and participation in the further proceedings of the National Association of Regulatory Utility Commissioners on behalf of the State regulatory commissions which have a substantial interest in the matters yet to be determined herein.

IV. Conclusion

27. In view of the foregoing, we conclude that we should permit the new and revised tariffs to go into effect, as now scheduled, on January 1, 1969, without scheduling a formal investigation or hearing at this time. Our action is not to be construed as approval thereof and these tariffs are subject to such further action as the Commission may wish to take with respect thereto.

28. *Accordingly, it is ordered*, That the various pleadings and requests for rejection and suspension or formal investigation of the aforementioned new and revised tariffs *Are hereby dismissed* without prejudice.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX A

Tariffs and Supporting Documents

1. A.T. & T. transmittal letter No. 10240, dated September 13, 1968 (relating to proposed revisions in A.T. & T. tariff FCC No. 263).

2. A.T. & T. transmittal letter No. 10249, dated October 2, 1968 (relating to proposed revisions in A.T. & T. tariff FCC No. 263).

3. A.T. & T. (unnumbered) letter to FCC, dated October 4, 1968, stating, among other things, intent to offer in future station equipment to permit unattended operation of data terminal (i.e., automatic calling and answering), and to require A.T. & T. dataphone sets to meet tariff technical criteria (relating to proposed revisions in tariff FCC No. 263).

4. A.T. & T. transmittal letter No. 10267, dated October 18, 1968 (relating to proposed revisions in A.T. & T. tariff FCC No. 263).

5. A.T. & T. transmittal letter No. 10270, dated October 22, 1968 (relating to proposed revisions in A.T. & T. tariff FCC Nos. 263 and 260).

6. A.T. & T. (unnumbered) letter to FCC, dated October 29, 1968, stating intent to offer facilities by middle of 1969 to permit automatic connection of customer-provided PBX and intercom-type system to the long-distance telecommunication network (tariff FCC No. 263).

7. A.T. & T. transmittal letter No. 10281 to FCC, dated October 30, 1968 (relating to proposed revisions in tariff FCC Nos. 263 and 260).

8. A.T. & T. transmittal letter No. 10291, dated November 12, 1968, and revised pages to A.T. & T. tariff FCC No. 263 submitted therewith; reissuing and revising tariffs submitted under transmittal Nos. 10240, 10249, 10267, 10270, and 10281.

9. A.T. & T. letter (unnumbered) of November 15, 1968, to FCC and enclosed statement in support of provision in new and revised tariffs that connection of customer-provided terminal and systems shall be made through a network control signaling unit furnished, installed, and maintained by the telephone company.

10. A.T. & T. transmittal letter No. 10293, dated November 15, 1968, and revisions submitted therewith in A.T. & T.'s tariff FCC No. 259 (wide-area telecommunication service).

11. A.T. & T. transmittal letter No. 10294, dated November 18, 1968, and revisions submitted therewith in A.T. & T.'s tariff FCC No. 260 (private-line service) re entrance facilities for use in customer connection's to the switched telephone network.

12. A.T. & T. letter (unnumbered), dated December 6, 1968, advising it as to when further revisions will be made in A.T. & T. tariff FCC No. 260 (private-line service).

13. A.T. & T. letter (unnumbered), dated December 13, 1968, in reply to pleadings and comments filed in response to aforementioned new and revised tariffs.

APPENDIX B

Tel-Plan, Inc.—Comments on the proposed tariff revisions in tariff Nos. 259, 260, and 263, filed December 10, 1968.

Aeronautic Radio, Inc. (ARINC).—Comments on the proposed tariff revisions in tariff No. 260, filed December 6, 1968.

Charles W. Schweizer Associates, Inc.—Comments on the proposed tariff revisions in tariff No. 263, filed December 11, 1968.

The Data and Graphic Communications Section of the Electronics Industries Association petition.—Protesting and opposing proposed tariff revisions in tariff 263 and for investigation, filed December 2, 1968.

National Retail Merchants Association (NRMA).—Comments on the proposed tariff revisions in tariff No. 263, and request for acceptance of the tariff filing, filed December 2, 1968.

Bethlehem Steel Corp. et al.—Revised petition to reject certain tariff provisions in tariff No. 263, filed November 26, 1968, and supplemental petition to reject tariff filing, filed December 2, 1968.

TELCON Associates, Inc.—Comments on the proposed tariff revision in tariff No. 263, filed November 15, 1968, and a supplemental statement commenting on the proposed tariff revisions in tariff Nos. 259, 260, and 263, filed December 4, 1968.

Computer Security Systems.—Petition objecting to certain revisions in tariff No. 263 and asking that they be rejected, filed December 3, 1968.

Photo Magnetic Systems, Inc.—Letter objecting to certain revisions in tariff No. 263, filed November 22, 1968, and a petition to reject certain provisions of tariff No. 263, filed December 2, 1968.

Ripley Co.—Comments on the proposed tariff revisions of tariff No. 263 and request for appropriate relief, filed December 2, 1968.

Small Business Administration.—Statement supporting the suspension and investigation of certain revisions in tariff No. 263, filed December 2, 1968.

Aerospace Industries Association of America, Inc. (AIA).—Petition for rejection of certain revisions of tariff No. 263 and for other relief, filed December 3, 1968.

United States.—Memorandum requesting investigation of a specific revision in tariff No. 263, filed December 2, 1968.

Altone Systems, Inc.—Petition for rejection of certain revisions in tariff No. 263, filed October 15, 1968, and a supplemental letter, filed December 2, 1968.

Xerox Corp.—Supplemental pleading withdrawing objection to certain revisions in tariff No. 263 and additional comments, filed November 29, 1968.

Microwave Communications, Inc. (MCI).—Petition to reject certain tariff revisions in tariff No. 263 and for other relief, filed December 3, 1968.

Thomas F. Carter, Carter Electronics Corp. and Carterfone Communications Corp.—Petition for rejection of tariff revisions or, in the alternative, for suspension, investigation, and hearing, and for other relief, filed December 2, 1968.

Plessey, Inc.—Petition for investigation of tariff Nos. 259, 260, and 263, filed December 4, 1968.

Marcom, Inc.—Supplemental petition to reject certain revisions in tariff No. 263 and comments on network control signaling, filed December 2, 1968.

Secretary of Defense (DOD).—Petition for suspension and investigation of certain tariff revision in tariff No. 263, filed December 2, 1968.

ACTION! Systems Co.—Comments on the proposed revisions in tariff No. 263, filed November 29, 1968.

National Committee for Utilities Radio (NCUR).—Supplemental petition for rejection of certain revisions in tariff No. 263, filed December 3, 1968.

International Telephone & Telegraph Corp. (ITT).—Supplemental petition for rejection in certain tariff revisions or, in the alternative, suspension, investigation, and hearing, filed November 29, 1968.

Magnavox Co.—Petition to reject certain revisions in tariff No. 263, and for other relief, filed November 27, 1968.

American Trucking Association (ATA).—Petition to reject certain proposed tariff revisions in tariff No. 263, filed November 29, 1968.

Business Equipment Manufacturers Association (BEMA).—Supplemental petition to reject certain proposed tariff revisions in tariff No. 263, filed November 27, 1968.

American Petroleum Institute.—Comments on proposed tariff revisions and requests for acceptance of the tariff filing, filed November 27, 1968.

The American Bankers Association.—Comments concerning the revisions in tariff No. 263, filed November 27, 1968.

Western Data Products, Inc.—Letter commenting on the proposed tariff revisions, filed November 22, 1968.

American Trucking Association, Inc.—Petitions to reject proposed tariff revisions to tariff Nos. 259 and 260, filed December 12, 1968.

Magnavox Co.—Petition to reject proposed revisions in tariff No. 259, filed December 17, 1968.

Business Equipment Manufacturers Association (BEMA).—Comments on the proposed revisions to tariff Nos. 259 and 260, filed December 18, 1968.

Bethlehem Steel Corp. et al.—Petitions to reject proposed revisions in tariff Nos. 259 and 260, filed December 17, 1968.

APPENDIX C

Technical Criteria for All Terminals and Systems Connected by Direct Electrical Connection, Effective January 1, 1969

1. The power of the signal at the central office shall not exceed 12 db below 1 mw when averaged over any 3-second interval.

ii. The signal at the telephone company interface located on the customers' premises shall be controlled so that:

1. The power in the band from 3,995 to 4,005 Hz shall be at least 18 db below the power of the signal as specified in i., above.

2. The power in the band from 4,000 to 10,000 Hz shall not exceed 16 db below 1 mw.

3. The power in the band from 10,000 to 25,000 Hz shall not exceed 24 db below 1 mw.

4. The power in the band from 25,000 to 40,000 Hz shall not exceed 36 db below 1 mw.

5. The power in the band above 40,000 Hz shall not exceed 50 db below 1 mw.

6. The signal shall at no time have energy solely in the 2450–2750 Hz band and any signal power in such band shall not exceed the power present at the same time in the 800–2450 Hz band.

APPENDIX D

Technical Criteria for All Terminals and Systems Connected by Acoustic or Inductive Means, Effective January 1, 1970

i. The power of the signal at the output of the network control signaling unit shall not exceed 9 db below 1 mw when averaged over any 3-second interval, and such signal at such output point shall be controlled so that:

1. The power in the band from 3,995 to 4,005 Hz shall be at least 18 db below the power of the signal as specified in i., above.

2. The power in the band from 4,000 to 10,000 Hz shall not exceed 16 db below 1 mw.

3. The power in the band from 10,000 to 25,000 Hz shall not exceed 24 db below 1 mw.

4. The power in the band from 25,000 to 40,000 Hz shall not exceed 36 db below 1 mw.

5. The power in the band above 40,000 Hz shall not exceed 50 db below 1 mw.

6. The signal shall at no time have energy solely in the 2450–2750 Hz band and any signal power in such band shall not exceed the power present at the same time in the 800–2450 Hz band.

Carterfone Tariffs

(In the matter of A.T. & T. "Foreign Attachment" tariff revisions—Nos. 259, 260, 263)

Dissenting Opinion of Commissioner Nicholas Johnson

The 11-year-long saga of the *Carterfone* case involves, in general, the competitive structuring of this country's communications network. A small manufacturer, Tom Carter, sought to market an invention enabling the user to couple a telephone handset to a mobile radio transmitter. The telephone company, through its jingoist-titled "foreign attachment" tariff, opposed his efforts. For A.T. & T. has consistently held to the position that it is entitled to a monopoly not only of the Nation's switching system and communications lines, but of all consumer equipment "attached" to its system as well. (A distant analogy might be suggested if an electric power company were to insist on a monopoly of the manufacture, installation, and repair of toasters, television sets, and all other electrical appliances that could be plugged into an electric wall socket.) Yielding not an inch, A.T. & T. has consistently and successfully fought off for years the Tom Carters of the communications industry.

But Tom Carter persisted. For 11 long years he persisted. And then, finally, earlier this year, the FCC held the foreign attachment tariffs illegal and authorized Tom Carter to go ahead with the sale of his device. *Carterfone*, 13 FCC 2d 420 (1968). The Commission's opinion was heralded as a commendable effort to open up competition in the communications business.

As experienced reformers have long since discovered, however, the political victories that are won after long struggle under the light of public scrutiny can be very quickly lost in the dark backrooms of practical implementation. The new legislation or agency decision is praised and then forgotten. And when—if ever—anyone goes back to see how it all worked out he finds the situation very little changed from before. The swamp waters have returned to their former level.

And so it was, shortly after the Commission's *Carterfone* decision, that A.T. & T. petitioned for a stay of its effectiveness and for a reconsideration of the decision. The Commission's Common Carrier Bureau did not oppose the stay, and the Commission granted it until November 1, 1968—over the dissents of Commissioner Cox and myself. *Carterfone*, 14 FCC 2d 149, 151 (1968). When the Commission affirmed its decision on reconsideration, *Carterfone*, 14 FCC 2d 571 (1968), the telephone company went to court. Subsequently, A.T. & T. asked for and was granted, another extension of the stay of the effective date of the decision from November 1, 1968, to January 1, 1969. *Carterfone*, 15 FCC 2d 31 (1968).

All these delaying tactics are well known, and fully exercised by A.T. & T. What A.T. & T. had not counted on, however, was that its first tariff proposal would be watched by small businessmen from across the country in addition to Mr. Carter—and that they would send up howls of protest when they saw what A.T. & T. was trying to do. For A.T. & T.'s first proposals were designed to be drawn very narrowly in an effort to render this landmark decision of limited practical effect.

Having been publicly caught in this untenable posture, Bell quickly shifted to its present position. It has now offered tariffs which are somewhat more liberal—but it insists that from now on all proceedings be conducted off the record.

These new tariffs raise three separate questions. First, who is to own and control the network signaling device—the dial mechanism that imparts control signals to the telephone system? Bell argues that only it can control this part of the overall telephone system. International Telephone & Telegraph sees no reason why the domestic telephone handset market should be a virtual monopoly. The Department of Justice believes the Commission should formally investigate this question. The majority concludes that a tariff bar against a customer-provided network control device is not in violation of the *Carterfone* ruling. It is my view that such a bar does violate the spirit of *Carterfone* and its reasonableness should be investigated in a formal proceeding.

Secondly, there is the question of how well these new tariff provisions are going to work, what their effect will be, and what the literal words of the tariff mean operationally. This is the arena, of course,

in which this ballgame will ultimately be won or lost. Disagreement between the parties is most likely in view of the past history of the foreign attachment question.

Finally, a number of parties have raised specific questions about parts of the tariffs Bell has filed. Arguments are made that specific provisions are unnecessarily rigid, too tightly drawn, or exclude equipment arbitrarily. The majority is allowing these tariffs to go into effect without approving them and says that these specific questions on the tariffs will be taken up in the informal proceedings. But a tariff is an application by Bell to do business in a certain way. The majority may not be giving its legal imprimatur to the Bell tariffs, but the fact remains that Bell is now free to do business under these tariffs until it decides to make a change, or the Commission again is forced to institute formal proceedings. I would prefer to have Bell respond formally to each objection to the tariffs posed by private groups, and would hope that the Common Carrier Bureau would make its own evaluation of the public interest factors on a formal record to be presented to the Commission.

We are now confronted with a proceeding in which virtually every party—other than the telephone company and the Common Carrier Bureau—opposes part or all of these tariffs. And yet they are allowed to go into effect, with differences to be resolved in informal closed-door sessions.

I cannot agree that the validity of the telephone company's refusal to permit subscribers to provide their own telephones purchased in a free market is a question which can appropriately be determined through informal discussions. The *Carterfone* case is a testimony to the tenacity of the little fellow who won out over a procedural system which for years permitted the telephone companies to monopolize the connection of private communications systems with the telephone network. While the *Carterfone* decision does much good in permitting beneficial interconnection, the Commission's present treatment of a far more important question will result only in unnecessary delay before it can be resolved. It is tough enough for the little operator to win out in formal proceedings before this Commission and the courts. It is virtually impossible without such protections.

No one will disagree with the importance of the issue presented by the insistence of A.T. & T. and the other telephone companies that they must be the sole provider of all equipment which initiates signaling. But this issue, of such great importance to every telephone company subscriber, is now on the road to being settled through a process in which the ordinary person will have no effective voice and of which, indeed, he is likely to be totally unaware. The telephone companies will be well represented. Large corporations seeking more flexibility in the use of telephone facilities will be well represented. The ordinary person who cannot understand why he should not be permitted to buy his own telephone will not be represented at all, except indirectly by some other party or by the "referee" Commission staff.

I recognize that the entire process of reviewing telephone company tariffs is not conducive to ordinary consumer participation. This makes it all the more important that a question so vitally affecting the ordi-

nary consumer be examined and decided under the light of day in fully public proceedings rather than in informal negotiations. It seems highly unlikely that negotiations can lead to any substantial changes in the telephone company's position on this issue. Therefore, if there is any doubt as to whether the proposed tariff provisions are unreasonable, the question must be explored in a full hearing under section 205 of the communications act, since Commission action to remedy an unreasonable tariff must be after hearing. There is no point in not instituting such a hearing at the outset, and the failure to do so can only result in unnecessary delay. Informal procedures have no advantage over the formal hearing process in this situation. This is not a negotiation among sovereigns where forcing a party to take a public position may make it more difficult for him to back off gracefully. It is a matter for decision by a public body entrusted with the duty to make a decision, and with the power to enforce it. Furthermore, the *Carterfone* proceeding furnishes ample evidence that the hearing process is an excellent means of testing technical claims.

I do not urge that the proposed tariffs must necessarily be rejected or suspended. I do urge that it is a great mistake to enter upon this new exploration to which *Carterfone* was a prelude in a semiprivate bargaining session rather than in the full hearing process in which the public may justifiably have confidence.

APPENDIX G

Notice Of Inquiry, Proposed Rulemaking and Creation of Federal-State Joint Board (Docket 19528), **35 F.C.C.2d 539 (1972)**

F.C.C. 72-522

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PROPOSALS FOR NEW OR REVISED CLASSES OF INTERSTATE AND FOREIGN MESSAGE TOLL TELEPHONE SERVICE (MTS) AND WIDE AREA TELEPHONE SERVICE (WATS)	Docket No. 19528

NOTICE OF INQUIRY, PROPOSED RULEMAKING, AND CREATION OF FEDERAL-STATE JOINT BOARD

(Adopted June 14, 1972; Released June 16, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. Notice is hereby given of (a) an inquiry into whether and under what conditions the telephone companies subject to our jurisdiction should provide new or revised classes of interstate and foreign MTS and WATS service whereby customers would have the option of furnishing "Network Control Signalling Units" (NCSU) and any needed "Connecting Arrangements" (CA) (or the functional equivalent thereof) that are presently furnished only by the telephone company; (b) proceedings to determine what rules, if any, the Commission should adopt with respect to the foregoing; and (c) the convening of a Federal-State Joint Board under Section 410(c) of the Act to submit recommendations to us with respect to the foregoing.

BACKGROUND

2. The interstate (and foreign) MTS and WATS offerings of the telephone companies have historically consisted of the furnishing of facilities, including the telephone hand set, for the public to make interstate or foreign telephone calls between telephones provided by the telephone companies. Thus MTS and WATS services have been and are now offered only as complete services that include the furnishing of the telephone instrument (with certain exceptions applicable, for example, to military installations and remote and hazardous locations). Any changes in the MTS and WATS offerings whereby the telephone company would offer to provide, at the option of the customer, only a portion of such MTS and WATS services and the customer would provide the rest, would constitute a basic and substantial change in the nature of these classifications of services. (See our *Carterfone* and related decisions at 13 FCC 2d 420 (7/27/68); 14 FCC 2d 571 (9/13/68); 15 FCC 2d 605 (12/26/68); 18 FCC 2d 871 (8/13/69); 19 FCC 2d 1068 (10/1/69).)

3. By Memorandum Opinion and Order of December 26, 1968 (15 FCC 2d 605) we initiated informal proceedings with the objective of

exploring the technical feasibility of establishing such new or modified service offerings. This action was taken in response to the contentions made by many users, manufacturers, distributors, suppliers and others that the interstate MTS and WATS service offerings as now constituted, with their restrictions on the provision of customer-owned NCSU's and CA's, are not adequate to meet either the current or prospective needs of the public for more flexible, efficient and economic access to the nationwide switched telephone network. In the informal proceedings initiated by us we were concerned with developing technical, engineering and operational data and information from all available sources to help us ascertain whether such revised service offerings could be made available to the public by the telephone companies without impairing the functioning of the basic nationwide telephone network and whether, and to what extent, measures should be taken to avoid adverse effects upon existing or proposed MTS and WATS services provided to the public generally.

4. To assist us in our evaluation of possible approaches to the resolution of this question we entered into a contract with the National Academy of Sciences (NAS) to make studies for us that were to be directed particularly to the question of whether such revisions in the MTS and WATS service offerings were technically feasible in view of our concern that the network be protected from harm. In its report to us, NAS concluded that, although uncontrolled interconnection of customer-provided facilities to the nationwide telephone network could cause harm to the network, it was technically feasible to accomplish the aforementioned basic revisions in MTS and WATS without network harm by establishing a properly authorized program of standardization and properly enforced certification of customer-provided equipment, installation and maintenance. In addition, pursuant to a contract between the Commission and the consulting firm of Dittberner Associates, we received a report from that firm which also concluded that such service revisions were technically feasible with an appropriate standards and certification program. Dittberner suggested various alternative approaches to accomplishing such revisions including a recommendation for a standards and certification program somewhat less extensive in scope from that suggested by NAS.

5. The reports submitted to us by NAS and Dittberner Associates, and the numerous comments thereon that we received from interested persons, indicated to us that consideration should be given to revisions in MTS and WATS offerings under a standards and enforcement program that would protect the telephone network from three types of harm identified by NAS, namely, (a) protection from excessive voltages and signal levels, (b) improper network signalling and (c) line imbalance. Accordingly, we created two advisory committees, pursuant to Executive Order 11007, to study the possibilities of initiating such a standards program for certain selected classes of equipment, namely, customer-provided PBX's, automatic dialers and recording and answering devices. We believed that, if an acceptable standards program could be developed for these particular devices, we would be in a better position to judge whether such a program for these and other customer-provided facilities was feasible and in the public interest.

These committees are now engaged in this effort. Reports and recommendations from these committees are expected to be submitted to the Commission in the near future.

Discussion

6. Resolution of these matters calls for a determination of whether and with what terms, conditions or limitations interstate tariffs should be revised or the Commission should adopt rules and regulations to permit customers for switched telephone network services to have the option of providing their own network control signalling units and any needed connecting arrangements in lieu of the units and arrangements now provided by the telephone companies. Under ordinary circumstances we could undertake to resolve these questions through the usual procedures provided for under the Act. However, we believe that there are unique conditions applying to this particular matter before us that call for the invocation of extraordinary procedures in which state regulatory agencies will play a significant role in assisting us in our decision-making processes.

7. We believe that special procedures are required for the reason that any action that we might take herein to provide the optional MTS or WATS services as heretofore described would appear to require, as a practical matter, that complementary changes be made in the offerings of local telephone exchange and intrastate toll services. For example, if this Commission should decide that, insofar as interstate or foreign MTS and WATS are concerned, the telephone companies should allow customers the option of providing their own network control signalling units for those otherwise provided by the telephone companies, implementation of such a decision would require, as a practical matter, that the same options are also available in connection with local exchange and intrastate MTS and WATS. This is because almost all such units are used in common for both interstate and local and intrastate communications. Accordingly, we believe that we should not undertake the final resolution of the issues herein without the closest coordination and cooperation between this Commission and state regulatory agencies which have regulatory responsibility for local and intrastate communications services. Therefore, we shall refer these proceedings to a Federal-State Joint Board pursuant to Section 410(c) of the Act.

8. We believe that we should delineate carefully the parameters of the subject matter of our proceeding herein. First, we should make clear that we are not concerned with the question of whether the current tariff prohibitions against customer-provided NCSU's and CA's in the offering of interstate MTS and WATS are in compliance with our decision in *Carterfone* (13 FCC 2d 420, 14 FCC 2d 571). We have already expressly ruled that the tariff requirement that the carrier be the sole supplier of the NCSU in these services does not violate *Carterfone*. We have stated that, in *Carterfone*, we were concerned with the use of customer-owned equipment in connection with MTS services, which, by definition, includes a carrier-provided telephone instrument which performs the network control signalling function. Thus, our decision in *Carterfone* does not hold that a customer may substitute his

own equipment or facilities (whether it be telephone instruments, loops, poles, or central office equipment) for that furnished by the telephone company in providing MTS as that service is defined in the tariff. Our decision in *Carterfone* dealt with "interconnection" and not "replacements of any part of the telephone system." 15 FCC 2d 605, 609–610. The same reasoning applies also to the current tariff prohibition against customer-provided CA's. MTS and WATS offerings historically have included the requirement that all CA's for direct connection of customer-provided equipment (e.g. electrocardiograph, telephotograph and recording devices) to the telephone system must be provided by the telephone company. In our *Recording Devices* decision of 1947 we expressly ruled that only the telephone company could provide CA's to connect customer-provided recording devices to MTS. 11 FCC 1033. Thus, the present restrictions in the interstate MTS and WATS tariffs against customers providing either the NCSU or the CA do not violate our decision in *Carterfone* and the Joint Board will not be concerned with this question. What we are concerned with in this proceeding is whether and under what terms and conditions customers should be given the option of providing their own NCSU's and any needed CA's, or the functional equivalent thereof.

9. As indicated in the foregoing, it is not our intention to consider in this proceeding any question as to whether there should be any modification of our holding in *Carterfone* or any revisions in the tariff provisions applicable to interstate MTS or WATS that have been filed to permit interconnection of customer-provided facilities to MTS and WATS as these services are now constituted. We believe that the soundness of our *Carterfone* decision has been amply demonstrated. New markets have been opened to the innovative enterprise of many companies; the public has benefitted from having a range of choices available when the individual user selects the terminal device or private system which will best serve his particular communications need; and there has been no actual demonstrable harm to the telephone system or its users. Accordingly, this proceeding will not be concerned with any question relating to whether or not modifications should be made in that decision or in any of the provisions in the interstate MTS and WATS tariff provisions filed in compliance therewith. Our proceeding herein is concerned with the pending and unresolved basic issues now before us as to whether, and to what extent, there is public need for us to go beyond what we ordered in *Carterfone* and permit customers to provide, in whole or in part, the aforementioned NCSU's and CA's in interstate MTS and WATS and, if so, what terms and conditions should apply to protect the telephone system and services of others.

10. To facilitate resolution of these issues, as stated in paragraph 5 above, we expect to receive in the near future reports and recommendations from the aforementioned Advisory Committees with respect to technical standards and a program of enforcement thereof designed to permit customers to provide NCSU's and CA's in whole or in part insofar as customer-provided PBX's and automatic dialers and answering devices are concerned. In addition, we have received a number of alternative proposals for achieving the same objectives from other sources. We intend, by supplemental order, to invite public comments

on the Advisory Committee reports and recommendations and the various alternative recommendations. We will refer all such recommendations and comments thereon to the Joint Board for its consideration and recommended decision. We will issue other supplemental orders from time to time, specifying the further procedures to be followed herein and such other specific items of inquiry and rule-making to be considered in this proceeding under the basic issues set forth above and in accordance with the Section 410(c) procedures provided for herein.

11. We should make clear that we are including proposed rule-making herein in order to facilitate the implementation of our final decisions in this proceeding. At this stage we are unable to determine whether any action we may wish to take should be implemented by the adoption of rules by the Commission or by the filing of tariff revisions by the carriers, or by a combination of both types of measures. However, we expect to develop in this proceeding all relevant, material and probative data and information needed for us to decide the issues herein including the question of whether and to what extent tariff revisions should be made by the carriers or rules adopted by us. Insofar as tariff revisions may be deemed necessary or desirable, we will be prepared to institute such ancillary procedures and issue such orders as may be required under Section 205 of the Act to prescribe such revisions.

12. ACCORDINGLY, pursuant to Sections 4(i), 4(j), 201–205, 208, 215, 218, 313, 403, 404 and 410 of the Communications Act of 1934, IT IS ORDERED, that the aforementioned inquiry and proposed rule-making proceeding IS HEREBY INSTITUTED;

13. IT IS FURTHER ORDERED, That a Joint Board is hereby convened pursuant to the provisions of Section 410(c) of the Communications Act of 1934, as amended; that such Joint Board shall consist of the three members of the Commission's Telephone Committee as designated from time to time, and four State Commissioners to be nominated by the National Association of Regulatory Utility Commissioners and approved by this Commission; and that the Chairman of the Commission shall be Chairman of the Joint Board;

14. IT IS FURTHER ORDERED, That the Joint Board shall consider all information, data, comments, views and other submissions in this proceeding and shall prepare a recommended decision to the Commission for its consideration and action; and that the State Commission members of the Joint Board shall sit with the Commission *en banc* at any oral argument that may be scheduled in this proceeding and shall be afforded an opportunity to participate in the Commission's deliberation, but not vote, when the Commission is considering the recommended decision of the Joint Board;

15. IT IS FURTHER ORDERED, That the proceeding herein shall be subject to further order by the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX H

First Supplemental Notice,
***Docket 19528,* 40 F.C.C.2d 315 (1973)**

F.C.C. 73-340

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PROPOSALS FOR NEW OR REVISED CLASSES OF INTERSTATE AND FOREIGN MESSAGE TOLL TELEPHONE SERVICE (MTS) AND WIDE AREA TELEPHONE SERVICE (WATS)	Docket No. 19528

FIRST SUPPLEMENTAL NOTICE

(Adopted March 29, 1973; Released April 3, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. By this first supplemental notice of inquiry and rule-making in this Docket, we are requesting comments on certain proposals submitted recently to the Commission recommending the establishment of programs for technical standards and enforcement thereof that, if adopted, would expand the options available to customers in the interconnection of customer-provided facilities to the nationwide telephone network.

2. In initiating this proceeding we stated that there are two basic issues to be explored. The first, or threshold question, is whether the telephone companies subject to our jurisdiction should be required or permitted to make further significant revisions in their interstate MTS and WATS tariffs so as to give customers options that they do not now have thereunder, namely that of being able generally to provide their own network control signalling units (NCSUs) and any needed connecting arrangements (CAs), or the functional equivalent thereof, in lieu of using telephone company-provided NCSUs and CAs as is now required under the tariffs in all interconnection situations involving direct electrical connections. The second basic issue is to determine what terms and conditions should govern if we should decide to extend such options to customers. We stated that, to facilitate resolution of both of these issues, we had, *inter alia*, established certain Advisory Committees to explore the possibilities of establishing a technical standards program for certain selected classes of equipment, i.e. PBXs, dialers and automatic answering devices, that could be a basis for providing such expanded options, at least as to these devices, and at the same time protect the integrity of the telephone network. (See 35 F.C.C. 2d, 539 et seq.; June 16, 1972)

3. We have now received the reports and recommendations of the PBX Standards Advisory Committee. These documents have been printed in two volumes and are available from the National Technical Information Service, Port Royal Road, Springfield, Virginia 22151.

Volume I (PB 212937) contains the Proposals of the Technical Standards Subcommittee (for Barrier-Type PBX) and Procedures and Enforcement Subcommittee (cost—$6.00). Volume II (PB 212938) contains the attachments to the Report of the Subcommittee on Procedures and Enforcement (cost—$3.00). A third volume (PB 213001) contains a Proposed PBX Experimental Program submitted by the PBX Procedures and Enforcement Subcommittee of the PBX Standards Advisory Committee (cost—$3.00). Any of these three volumes may also be ordered in microfiche form for 95¢ each.

4. In addition to the reports and recommendations of the PBX Standards Advisory Committee, which are limited to customer-provided PBX's, the Office of Chief Engineer of the Commission (OCE) has prepared and submitted a broader proposal that would apply to all kinds of customer-provided devices connected directly to the switched telephone network of the telephone companies. This OCE report is available in printed form as Technical Report T-7202 and may be obtained from the National Technical Information Service, Port Royal, Springfield, Virginia 22121 (cost—$3.00; 95¢, microfiche; PB-213018).

5. The principal features of the OCE proposal are described as follows. The Commission would incorporate into its rules the technical characteristics which must be met by all devices intended for direct connection to the switched telephone network. These specifications would be designed to provide reasonable protection against specific types of harm to the network, namely, hazardous voltages; in-band and out-of-band signal power; line inbalance; and improper network control signaling. Any manufacturer desiring to obtain approval for connection of devices to the switched telephone network would make application to the Commission for registration of each such device, providing a complete description of the device and all data required to demonstrate compliance with the standards. The Commission would, where necessary, also require the submission of sample units to its own laboratory for testing, otherwise, the attestation of the person performing the tests would be acceptable. Upon determination that the equipment would be capable of complying with the standards and that a grant would serve the public interest, convenience and necessity, a registration certificate would be granted. This would be attached to all identical units subsequently produced. If any application presented substantial factual questions that needed to be resolved, it could be set for evidentiary hearing. Registration would constitute authorization for the equipment to be directly connected to the switched telephone network. However, in appropriate cases, registration could be revoked. Applicants for registration would be required to pay filing fees which, as set forth in the proposal, would range from $500 to $1,000 and grant fees which are proposed to range from $100 to $500.

6. Further, under the OCE proposal the burden of showing *actual* (not potential) harm to the switched network in individual cases would rest upon the person claiming that harm was being caused.

This would apply to both the carrier and the customer providing his own device. Where a *proved* harm is found to exist the Commission could issue cease and desist orders. The proposal also provides for the tariffs of the telephone companies to be amended to specify that only devices approved by the Commission could be directly connected to the switched telephone network, and that in the event of *actual* harm, the carrier could disconnect the harmful device, whether or not it was approved. The proposal includes recommended federal legislation similar to that now set forth in Section 302 of the Act under which the FCC would be given express authority to regulate the sale, distribution, import, lease, use and manufacture of interconnection devices and under which the Commission would promulgate regulations to control effectively the marketing of non-complying devices. Finally, the proposal provides for state regulation and enforcement at the local level of any necessary installation or inspection requirements.

7. We have also received an alternative proposal by the NARUC Staff Subcommittee on Communication Interconnection. This proposal was submitted to the Commission under date of March 2, 1973 and is entitled "Procedures and Enforcement For Interconnection of Customer-Provided Communication Terminal Equipment." The Staff Subcommittee states that this proposal contains some concepts differing widely from other submissions and that the areas of most significant differences are: "(a) The proposal for an NARUC-FCC Interconnection Staff Committee as advisory to the Joint Board and/or the FCC on matters relating to an interconnection program; (b) The sections on enforcement methodology; (c) The sections on procedures for equipment installation and periodic maintenance inspection; and (d) The designation of the party to perform installation and periodic maintenance inspections." Copies of this report are available from the NARUC Washington, D.C. office. (1102 Interstate Commerce Commission Building, P.O. Box 684, Washintgon, D.C. 20044—Telephone No. 202-628-7325.)

8. In addition to the foregoing, the Commission has received other alternative suggestions that have been submitted informally in varying degrees of completeness as to specific standards that should apply and as to details of implementation. Some of these alternative proposals may be briefly identified as follows: (1) the suggestion that we adapt to interstate MTS and WATS services the intrastate "access arrangement" proposal of the Rochester Telephone Company approved in substantial part by the New York Public Service Commission in Opinion 72-18, Case 26064, 94 PUR 3d 370 (NY P.S.C. 1972); (2) Suggestions that the carrier be required to establish reasonable standards in the tariffs or in technical references and be responsible for enforcing compliance therewith similar in nature to the recent AT&T tariff revisions applicable to customer-provided headsets; and (3) Suggestions that the tariffs remain basically unchanged but that the carriers be required (a) to make improvements in their services,

such as elimination of delays in delivery of NCSUs and CAs, and (b) apply the same practices to carrier-provided facilities that are applied to customer-provided facilities.

9. These briefly described alternative proposals have not been submitted in sufficiently complete form to enable us or the Joint Board to consider them adequately. Accordingly, we invite interested parties who want to propose these or any other alternative programs to do so at the time fixed herein for filing comments. We emphasize that any alternative proposal should be in at least the same detail as the proposals of the PBX Advisory Committee and the Office of the Chief Engineer. Moreover, by the time that comments herein are due to be filed, we expect that the proposals of the Dialers and Answering Device Advisory Committee will be ready for submission to the Commission. Such proposals should be officially submitted as comments herein. Finally, inasmuch as we are providing that additional proposals may be submitted on or before the comment date, we are expressly allowing for reply comments so that we may have the benefit of the views of all interested parties on any additional proposals that may be submitted.

10. In submitting comments on proposals herein, we wish to make clear that we are concerned at this stage of the proceeding with whether it is feasible from a technical, engineering, operational, and administrative standpoint to establish an optional program of standards and enforcement thereof in lieu of or in addition to the present tariff requirements for carrier-provided NCSUs and CAs. Although we do not wish to limit the scope of comments on any of these proposals, we are not considering at this time questions as to whether or to what extent there may be any adverse economic or environmental consequences from the ultimate adoption of any of these proposals. We shall cover such issues in an appropriate manner by further supplemental notices in the near future. We are, however, interested at this time in ascertaining the total estimated costs of implementing and administering each of the proposed programs and in obtaining comments and views on how such costs should be financed and what persons or groups of persons or entities should be required to bear such costs. Accordingly, we invite the submission of the best estimates of the total costs of administering each proposal that is submitted and views as to how such costs should be borne. Further, we invite comments and views as to the specific procedures and rules that should apply to each proposal submitted, including details as to the methodology that should be followed to assure meaningful and effective enforcement of the requirements set forth in the proposal.

11. Accordingly, pursuant to the provisions of Sections 4(i), 4(j), 201–205, 208, 215, 218, 313, 403 and 404 of the Communications Act, the Commission hereby invites comments from interested parties on the aforementioned proposals of the PBX Standards Advisory Committee, NARUC and Office of Chief Engineer. Such comments, which may include any alternative proposals, shall be submitted on or before June 15, 1973.

Reply comments may be filed on or before August 15, 1973. As provided in our order herein of June 16, 1972 (35 F.C.C. 2d 539; 543) proposals, comments and reply comments will be referred to the Joint Board for its consideration and recommended decision. Based upon its review of the comments and the questions presented thereby, the Commission, after consultation with the Joint Board, will prescribe additional procedures as may be necessary and appropriate for the effective and expeditious resolution of this proceeding. An original and 14 copies of all comments and reply comments shall be submitted.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX I

Pertinent Statutes and Regulations

Section 2 of the Sherman Act, 15 U.S.C. § 2:

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Communications Act of 1934, 15 U.S.C. §§151 *et seq.*

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common car-

rier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every dis-

tinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Code of Federal Regulations, 47 C.F.R. § 68.102:

§ 68.102 Registration requirement.

Terminal equipment must be registered in accordance with the rules and regulations in Subpart C of this part, or connected through registered protective circuitry, which is registered in accordance with the rules and regulations in Subpart C of this part.

APPENDIX J

Citations To State Regulatory Decisions

Decisions In Which State Public Utility Commissions Prohibited Telephone Companies From Permitting Customer Ownership Of Telephone Instruments

Bluffs & Winchester Tel. Co., P.U.R. 1915A 928, 929 (Ill. Pub. Utils. Comm'n 1915); *Franksville Tel. Co.*, P.U.R. 1917A 270, 276 (Wis. R.R. Comm'n 1916); *Curtis Tel. Co.*, P.U.R. 1917A 674, 679 (Neb. State Ry. Comm'n 1916); *Springs Mutual Tel. Co.*, P.U.R. 1918A 488, 490 (S.D. Bd. R.R. Comm'rs 1917); *Littlepage v. Mosier Valley Tel. Co.*, P.U.R. 1918E 425, 432 (Or. Pub. Serv. Comm'n 1918); *Swanson*, P.U.R. 1920E 633, 635 (Cal. R.R. Comm'n 1920); *Tognini, Ghezzi & Dalidio Tel. Co.*, P.U.R. 1921C 72, 75 (Cal. R.R. Comm'n 1921); *Badger Mutual Tel. Co.*, P.U.R. 1926A 361, 364 (Wis. R.R. Comm'n 1925); *Pulaski Merchants & Farmers Tel. Co.*, P.U.R. 1925E 674, 676 (Wis. R.R. Comm'n 1925); *Social Tel. Co.*, P.U.R. 1915C 106, 109 (S.D. Pub. Utils. Comm'n 1915); *Guglielmetti Tel. Co.*, 28 Cal. R.C.R. 523 (Cal. R.R. Comm'n 1926). See also *Quick Action Collection Co.* v. *New York Tel. Co.*, P.U.R. 1920D 137, 143–44 (NJ. Bd. Pub. Util. Comm'rs 1920); *Spriggs* v. *Bell Tel. Co. of Pennsylvania*, 3 P.U.R. (n.s.) 42, 44 (Pa. Pub. Serv. Comm'n 1934); *Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.*, 70 P.U.R.3d 97, 101 (Minn. D. Ct. 1966); *Proposed Changes in Rates, Charges, Rules and Regulations for Connection of Subscriber-Provided Equipment*, Case No. 25040, p. 166 (N.Y. Pub. Serv. Comm'n, July 8, 1969); *Netsky* v. *Bell Tel. Co. of Pennsylvania*, 65 P.U.R.3d 145, 149 (Pa. Pub. Util. Comm'n 1966); *Harmony of Ft. Lauderdale, Inc.* v. *Southern Bell Tel & Tel. Co.*, 69 P.U.R.3d 261, 266–67 (Fla. Pub. Serv. Comm'n 1967); *Southwestern Bell Tel. Co.* v. *Ralph Hicks*, 57 P.U.R.3d 188, 194 (Ark. Pub. Serv. Comm'n 1965); *Newton* v. *Jamestown Tel. Corp.*, 6 P.U.R. (n.s.) 27, 31 (N.Y. Pub. Serv. Comm'n 1934).

No. 82-2128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

v.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit—on the basis of the specific facts of this case established in a five-month jury trial—correctly held that the anticompetitive and predatory practices adopted and implemented by petitioners to maintain their telephone terminal equipment monopoly were not protected by the First Amendment under the *Noerr-Pennington* doctrine.

STATEMENT REQUIRED BY RULE 28.1

Respondents Litton Systems, Inc. and Litton Business Systems, Inc. are each wholly-owned subsidiaries of Litton Industries, Inc. Respondent Litton Business Telephone Systems, Inc. is a wholly-owned subsidiary of respondent Litton Systems, Inc. Respondent Litton Industries Credit Corporation is a wholly-owned subsidiary of Litton Financial Services, Inc., which is a wholly-owned subsidiary of Litton Industries, Inc. In addition to other wholly-owned subsidiaries, Litton Industries, Inc. has a partially-owned affiliate, National Tag Co., an Ohio Corporation.

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APPENDIX *

* The Appendix to the Brief for the Respondents in Opposition ("Res. App.") has been separately bound, pursuant to Rules 21.1(k) and 22.2. The Appendix to the Petition for Writ of Certiorari will be cited as "Pet. App.," and the Joint Appendix filed in the Court of Appeals will be cited as "A". Finally, citations to the trial transcript will be designated as "Tr"

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Respondents ("Litton") file this brief in opposition to the petition of the Bell System companies ("AT&T") for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit. Like the Questions Presented, AT&T's Statement of the Case is surprisingly misleading and inaccurate. The statement actually ignores and is substantially contradicted by both the voluminous trial record and the jury's specific findings sup-

porting its verdict. The statement also misrepresents the decisions of the FCC and of the Court of Appeals.

The following is Litton's statement of the nature of the case, its regulatory context, and a summary of the trial proceedings and of the decision of the Court of Appeals.

A. NATURE OF THE CASE

1. Prior to 1956, AT&T had two absolute monopolies in the geographical areas of the country serviced by AT&T companies.[1] In those areas, AT&T had a lawful monopoly of the local central office switching systems and the wires and cables leading from them to its telephone customers' businesses and residences ("the telephone network"). However, it also possessed a second, but illegal, monopoly in the sale and lease of individual telephone sets and business telephone systems (key systems and PBXs). These telephone sets and systems are referred to in the industry as "telephone terminal equipment."[2]

After the expiration of the Bell patents at the end of the nineteenth century, AT&T maintained its telephone terminal equipment monopoly by exercising its monopoly power over the telephone network. AT&T did this simply by refusing to attach any competitor's terminal equipment to its network and by cutting off telephone service to any telephone customer who used non-Bell equipment. Pet. App. 8a. As the FCC later observed, it was as if an electric utility had refused to permit a toaster or other

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[1] AT&T "operating companies" provide the exclusive local telephone service in areas containing over 80% of the telephones in the United States. The rest of the country is serviced by 1600 independent local telephone companies (mostly small) which interconnect with AT&T's long distance service.

[2] Key systems, used primarily by small offices, allow a single telephone set to connect from 2 to 40 other sets through the use of buttons on the face of the telephone set. A 1786-87, 1784-85, 1787. PX 2207, 2208. PBX systems, used primarily by large business firms, employ a central console and a switching mechanism to allow interconnection of from about 40 to up to as many as several thousand telephones. A 1786-88.

electrical appliance to be plugged into a wall socket unless it was manufactured, installed and maintained by the utility. *In re Primary Instrument Concept*, 68 F.C.C.2d 1157, 1163-64 (1978) (Res. App. 97a, 103a-04a).

In two landmark decisions, the Court of Appeals in *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956) and the FCC in *In re Carterfone Device*, 13 F.C.C.2d 420 (1968) (Res. App. 33a), articulated the rule of law that AT&T could not discriminate against equipment made or supplied by its competitors unless it could demonstrate that the competitors' equipment actually harmed the network. Both of these cases held AT&T's practices of excluding competitors' equipment to be illegal. Both cases also rejected as unsubstantiated AT&T's claims that the competitors' equipment was harmful.

2. In response to *Carterfone*, AT&T devised the interface device practice at issue in this case which it implemented by filing a new tariff in October 1968. Effective January 1, 1969, AT&T's tariff permitted customers to attach telephone terminal equipment supplied by its competitors to the telephone network, but only if the customer paid AT&T to provide, install and maintain an interface device as a barrier between the competitor's equipment and the network. The monthly rental for the interface device was prohibitive, amounting to several times the monthly rental AT&T charged for its telephone. No interface device was required, however, if the telephone customer obtained terminal equipment from AT&T, even where the equipment was identical to that of AT&T's competitors. A 1789-93, 1796, 1798-802, 1804-05, 2104-07, 2206, 2492-94, 2586-87, 5147, 8048.

Because of its expense and the opportunity it gave AT&T to interfere with every sale of terminal equipment by its competitors, the interface device made it economically impossible for other companies to compete successfully with AT&T in the business terminal equipment

market. Litton and every other nationwide competitor of AT&T (*i.e.*, ITT, General Electric, Arcata, and RCA) suffered losses and left that market by the end of 1976. PX 1932; PX 1933; A 1637, 16175, 1727, 3210-11, 3057-67, 12163-68; PX 5337 at 576, 579-81, 583-85; A 5764-77, 10683, 2407-08, 2422-24, 2426-31, 2432-36, 2665-66, 10897.

3. In June 1976, Litton filed its Complaint alleging that AT&T had violated Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), by monopolizing and attempting to monopolize the telephone terminal equipment market through its imposition and maintenance of the interface device requirement and various other anticompetitive practices. AT&T's purported justification for its discriminatory practices at trial was what it had been in the past—that the interface device was necessary to protect the network from harm.

B. THE REGULATORY FRAMEWORK

Following passage of the Federal Communications Act in 1934, AT&T was required to describe its "practices" and rates in tariffs filed with the FCC. 47 U.S.C. § 203 (1976).[3] The FCC may suspend a practice or rate for five months (47 U.S.C. § 204(a) (1976)), and after hearing, may strike the practice or rate altogether if it is unreasonable, discriminatory or otherwise in violation of the Act. 47 U.S.C. § 205(a) (1976).

1. Prior to 1956, AT&T's practice of prohibiting interconnection of competitors' equipment to the network had been embodied in a tariff on file with the FCC. In *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 268-69 (D.C. Cir. 1956), the Court of Appeals struck down that tariff prohibition on the ground that AT&T was unable to substantiate its claim that the prohibition was neces-

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[3] AT&T may engage only in those practices which it has disclosed to the FCC and the public through tariff filings. 47 U.S.C. §§ 203(b), 203(c) (1976). AT&T must then follow those practices until they are superseded by new tariffs.

sary to protect the network. The court held that under the Communications Act the barring of harmless equipment was an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." *Id.* at 269.

On remand, the FCC in 1957 ruled that "a blanket prohibition" against customer-provided non-Bell equipment, "without discriminating between the harmful and the harmless," was illegal and that any similar restrictions would be illegal "to the extent that they prohibit a customer from using . . . the Hush-A-Phone device *or any other device* which does not injure defendants' employees, facilities, the public . . . or impair the operation of the telephone system." *Hush-A-Phone Corp. v. AT&T Co.*, 22 F.C.C. 112, 113-14 (1957) (Res. App. 27a, 28a-29a) (emphasis added).

Following the FCC's decision in 1957, AT&T allowed the Hush-A-Phone device to be attached to its network, but it ignored the broad mandate of the FCC order and its applicability to other equipment. AT&T's new tariff continued to proscribe, without distinguishing between harmful and harmless equipment, the direct electrical connection of any type of device with its telephone lines. A 6423. However, the FCC was not required to and therefore did not on its own initiative pass on the lawfulness of AT&T's post-*Hush-A-Phone* practice.

2. When the FCC in 1968 did review AT&T's post-*Hush-A-Phone* tariffs in a private antitrust action referred to it under the doctrine of primary jurisdiction, AT&T again sought to justify its exclusionary practice on the ground that its competitors' equipment would harm the network. *Carterfone* (Res. App. 33a). Finding that AT&T again had failed to substantiate its claim, the FCC held that the Bell System's practice was "unreasonable" and "unlawful" and that "[t]he vice of the present tariff, here as in *Hush-A-Phone*, is that it prohibits the use of harmless as well as harmful devices." *Id.* at 36a-

37a. Going beyond the mere decision that the Carterfone device was harmless, the FCC struck down AT&T's tariff in its entirety and further ruled that AT&T's exclusionary practice had been "unreasonable and unreasonably discriminatory since its inception." *Id.* at 38a. The FCC also rejected AT&T's efforts to make it appear that the Commission was in some way responsible for AT&T's tariff. The tariff, it stated, "was the carrier's own." *Id.*

In *Carterfone*, the FCC specifically suggested that AT&T could protect the network either by (1) adopting a practice of prohibiting equipment which "actually cause harm" (Res. App. 37a) or (2) specifying "technical standards" that distinguished between harmful and harmless equipment. *Id.* at 39a.[4] AT&T ignored these suggestions and adopted a new blanket practice applicable to all competitors' equipment, whether harmful or harmless. It imposed a costly, troublesome and unnecessary interface device as a barrier between any non-Bell-supplied equipment and AT&T's network, a device which had to be obtained from, installed by, and maintained by AT&T at a rental cost many times what AT&T charged for individual telephone sets. A 2113, 2495-96, 2586-87, 3829-30.

AT&T also urged the FCC not to suspend the interface device practice or to hold any "hearing or investigation" that would delay its effective date. *AT&T "Foreign Attachment" Revisions*, 15 F.C.C.2d 605 (1968) (Pet. App. 162a). At AT&T's request, the FCC permitted the tariff to go into effect without ruling on its validity but

[4] In denying AT&T's request for reconsideration, the FCC emphasized AT&T's obligation to demonstrate "actual harmful effects" and the Commission's preference for "reasonable" technical "standards," and it underscored the broad sweep of its decision in *Carterfone*. *In re Carterfone Device*, 14 F.C.C.2d 571, 572 (1968) (reconsideration decision) (Res. App. 43a, 44a). It rejected the assertion that the issues "related solely to the Carterfone" device: "[I]t was well understood that this was an 'interconnection' case, and A.T.&T. and General both argued on a broad base . . . the need for a general prohibition against all interconnection not arranged by them." *Id.* at 573 (Res. App. 45a).

stated that in doing so "*we are not giving any specific approval to the revised tariffs.*" *Id.* at 167a (emphasis added).

3. When it became clear in the mid-1970s that AT&T was not going to replace the interface device practice with standards, the FCC was forced to pass on the validity of AT&T's interface tariff. In *First Report and Order in Docket 19528*, 56 F.C.C.2d 593, 598 (1975) (Res. App. 51a, 56a), the FCC declared the interface device tariff unlawful as an "unnecessarily restrictive limitation" and an "unjust and unreasonable discrimination." It reached this result because, in the intervening years after the *Carterfone* decision, AT&T had failed to present any evidence that the interface device was necessary to protect the network from harm. The FCC specifically found that numerous special entities such as utilities, the military and government agencies, as well as 1600 independent telephone companies, had connected non-Bell equipment directly to the Bell network with "no demonstration of network harm." *Id.* The FCC further pointed out that AT&T's interface device practice had been unlawful from the beginning because *Carterfone* "placed the burden of proof squarely upon the carriers—not the users or this Commission—to demonstrate" that terminal equipment "would cause either technical or economic harm to the telephone network." *Id.* at 54a. This "burden," the Commission said, "was to be met *prior* to the filing of a tariff restricting the use of such equipment." *Id.* (emphasis in original).

Finding that in the "seven years" since *Carterfone*, "the carriers have been afforded ample opportunity to propose effective procedures and/or tariff conditions to prevent harm without unduly restricting a customer's basic right to make reasonable use of the facilities and services furnished by the carrier," but that "this the carriers have failed to do," the FCC reached the "separate and independent conclusion" to adopt a set of technical standards applicable to terminal equipment, regardless of source. Res. App. 56a-57a.

4. In *Second Report and Order in Docket 19528*, 58 F.C.C. 2d 736 (1976) (Res. App. 79a), the FCC extended the standards program to PBX and key systems. In that Report, the FCC reiterated that *Hush-A-Phone* and *Carterfone* had established "an overall policy framework"; that it had allowed the interface device requirement to go into effect "[w]ithout ruling as to the necessity for or lawfulness of the tariff requirement"; and that the interface device requirement was "unnecessarily restrictive" and an "unjust and unreasonable discrimination." *Id.* at 80a-81a, 89a.[5]

On appeal from these decisions, the Fourth Circuit rejected AT&T's argument that the FCC lacked the power to include AT&T's own equipment in the standards program, stating that "what petitioners are attempting is the *preservation of the carriers' private lawmaking authority over independent manufacturers.*" *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1050-51 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (emphasis in original). The court also rejected AT&T's argument that *Carterfone* did not apply to terminal equipment, stating that the FCC "clearly held . . . that its *Carterfone* decision established an interconnection policy embracing other types of terminal equipment." *Id.* at 1042 n.3. This

[5] In *Third Report and Order in Docket 19528*, 67 F.C.C.2d 1255, 1272 (1978) (A 6710, 6727) (footnotes omitted), the FCC again stated that the post-*Carterfone* tariffs were unlawful because they violated the legal principle established in *Hush-A-Phone* and applied in *Carterfone*:

> When we ruled in *Carterfone* on the lawfulness of blanket prohibitions on the use of . . . customer-provided equipment . . . we concluded that the essential vice of these tariff prohibitions was that they were indiscriminately applied both to harmful and to benign equipment . . . . Prohibiting the connection of benign equipment . . . could not legally be sustained. The carriers responded to this ruling by requiring protective devices . . . for all connections of customer-provided equipment . . . . As we found in our *First* and *Second Reports* herein, this response unnecessarily required the use of the protective devices for those connections which were benign.

Court denied the petition for certiorari filed by AT&T and others.

5. Even after the FCC's authority to adopt the standards program had been judicially upheld, AT&T continued to argue that the "complete service premise" required that it alone must provide at least one telephone instrument as "an integral part of basic service," and to do so would not violate "antitrust principles" because there was "only one complete service." *In re Primary Instrument Concept* (Res. App. 99a-100a). The FCC rejected AT&T's proposal, finding it "fundamentally inconsistent with the principles of *Hush-A-Phone*, *Carterfone*, *Mebane* and the Registration Program." *Id.* at 98a. The FCC reiterated that "since 1969 telephone subscribers have had the right to provide their own terminal equipment . . . ." *Id.* at 100a. Here, as in prior decisions, the Commission indicated that it was simply following the "broad principle laid down in *Hush-A-Phone* as to the 'telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental.' " *Id.* The Commission went on to state that one way in which "a customer can reasonably use telephone service is by supplying his own terminal equipment, *including telephones, PBXs and key systems*, provided only that he does not harm the telephone network or cause other public detriment." *Id.* at 102a (emphasis added).

Finally, in *Primary Instrument*, the FCC rejected AT&T's oft-advanced argument that it alone "must have complete end-to-end service responsibility," pointing out that this argument had been "expressly rejected . . . in *Carterfone* [in 1968] . . . and again in the *Second Report* in [1976] . . . ." *Id.* at 104a (citations omitted). As the FCC further stressed, the 1934 Communications Act does not "contain any requirement that the carrier furnish a terminal of any kind as part of any communications service." *Id.* at 103a.

C. THE TRIAL BELOW AND THE JURY VERDICT

1. The trial below centered on AT&T's interface device practice: Was it necessary to protect the network from harm caused by competitors' equipment, as AT&T claimed, or was it adopted by AT&T as a means of driving its competitors from the market and protecting revenues derived from its illegal monopolization of the telephone terminal equipment market, as the jury found. The trial lasted more than five months and is reflected in over 18,000 pages of trial transcript. A well-qualified jury heard live testimony by 60 witnesses and deposition testimony of 54 others. Nine hundred and forty-five exhibits were received in evidence. Litton proved its case in large measure through the live testimony of 17 top AT&T executives and senior AT&T engineers responsible for the interface device, including its present and former chairman, president, general counsel, executives in charge of marketing and engineering, the head of Bell Labs Quality Assurance, and through hundreds of documents obtained from AT&T's files.

2. Litton introduced evidence, consisting primarily of documents obtained from AT&T's files, which established that AT&T imposed the interface device not to protect the network but for the specific purpose of maintaining its illegal monopoly in the profitable telephone terminal equipment market by erecting a barrier to competition that would provide it time to update its obsolete products, reorganize its marketing organization, and revamp its outmoded cost accounting system. *E.g.*, A 11033, 7788, 9497, 2145, 2800-01, 4235, 4418-20, 4616-21, 10431, 16202-04, 1924, 2046-48, 2110, 7456, 7479, 16280-81. Pet. App. 28a. As early as February 1968, AT&T senior executives were told by its experts that requiring an interface device for competitive equipment "would erect a redundant, artificial and economic barrier to those wishing to purchase their own equipment." A 11995. AT&T estimated that the alternative to the interface device—standards and competition—could cost AT&T hundreds of

millions of dollars in profits. A 11976-78. As one AT&T document stated: "Only the 'Black-Box' [interface device] . . . stands as the last hardware barrier between us and the final challenge of unbridled, unlimited, no-holds-barred competition." A 7438.

The evidence before the jury showed that AT&T's interface device proved to be a devastating economic barrier to competition. AT&T required each customer using a competitor's equipment to pay it about $6 per month, or $72 a year, to rent an interface device for each AT&T telephone line. AT&T also imposed installation charges of about $20 per interface device. A 8103, 1789-1803, 1811-12, 16413-15, 2510-11. The evidence showed that these direct costs completely barred competitors from the residential single-line telephone set market, precluded competition from 93% of the key telephone systems market (5 lines or less), added 18 to 35% to the monthly cost of non-Bell key systems of 5 to 40 lines, and added 8 to 20% to the monthly cost of non-Bell PBX systems (40 to 2000 or more lines). A 1916-17, 6873, 7985, 9859, 9863, 16288-90, 2512-13, 2735-38, 3079-112, 7081, 11786-89, 2647-51, 2676-77, 3069-77, 3114-19, 3358-59, 12342, 11121, 16198-201. In addition to these direct costs, competitors had substantial related overhead costs of 8 to 10% for late deliveries, late cutovers and installation of defective interface devices. A 2400-04, 2418-19, 2502-06, 2554-55, 2647-51, 2682-83, 2895-99, 3931-37, 5149, 5252-56, 5265-69, 5866-69, 5872-73, 5878-80, 5912-13, 5986-87, 2832-33, 2837-42, 2844-53, 3118-19, 5941-42.

AT&T's interface device also created a substantial psychological marketing barrier to competition because it raised customer doubts as to the quality of the competitor's equipment. A 2647-51, 2832-33, 2837-38, 5143-46, 12169-74, 12177-81. AT&T was well aware of this effect. One AT&T executive, for example, admitted that such a requirement, if applied to AT&T equipment, would have suggested to telephone customers that "our equipment isn't properly engineered to begin with." A 9408, 2743.

3. Although AT&T spared no expense in its defense, it was unable to justify its exclusionary interface device as necessary to protect the network from harm.[6] Indeed, AT&T was unable to come up with a single instance in which a competitor's equipment had harmed the network. The trial record even showed that AT&T often purchased the identical equipment sold by competitors and leased it to its telephone customers without interface devices. AT&T was in the end unable to demonstrate that competitors' equipment posed any greater risk of harm to the network than its own equipment. A 1806-09, 1852, 2028, 2113, 2206, 2492-94, 2586-87, 8048.

Further, the evidence conclusively showed that whatever protection was needed could easily have been provided by a nondiscriminatory system of technical standards, suggested by the FCC as early as 1968. AT&T had in its possession at the time of *Carterfone* "technical standards" which readily could have been reduced to writing and published in 1968. Even under the most exaggerated testimony offered by AT&T at trial, standards could have been published by mid-1969—two years before Litton entered the market. A 1860-63, 1899-1904, 2146-47, 2302-03, 16337-38, 3983-85, 4104-05, 4155-56, 4249-50, 4265-76, 4293-94, 4326-28, 4432-47, 4466-67. Knowing that the interface device could not be justified and that standards were inevitable, AT&T nevertheless continued for nearly a decade to require the interface device while continuing to oppose all efforts to replace it with technical standards. It did so by pursuing a course of conduct that included repetitive, baseless claims, misrepresentations, deceit and delay before the FCC. *See infra* pp. 22-25.

4. After eight days of deliberation, the jury found (1) that AT&T had monopoly power in the terminal equipment market in the areas of the country where it operated (Res. App. 21a); (2) that AT&T had "wilfully"

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[6] AT&T, in reports required by the FCC, disclosed that through 1981 it had spent $63 million defending this case during four and one-half years of pretrial and five months of trial.

maintained its monopoly "by predatory or anti-competitive conduct" (*id.*); and (3) that AT&T's monopolization had injured Litton. *Id.* In support of its finding that AT&T had wilfully maintained its monopoly power, the jury further found that AT&T had engaged in predatory or anticompetitive conduct by its bad faith (1) filing of the interface device tariff; (2) opposition to certification standards; (3) intentional delay in providing and installing interface devices; (4) refusal to sell inside wiring at all or on a reasonable basis; and (5) delay in making cutovers. *Id.* at 22a-23a. These five subfindings also supported the jury's finding that AT&T had attempted to monopolize the terminal equipment market. The jury further found that AT&T's violations of the Sherman Act drove Litton from the market and caused it $91,990,000 in damages as a competitor and $268,243 in damages as a user of the interface device.[7] *Id.* at 22a. These amounts were trebled as required by law. 15 U.S.C. § 15 (1976). AT&T's motion for judgment N.O.V., after full briefing and consideration, was denied by the trial court.

D. THE DECISION OF THE COURT OF APPEALS

In a comprehensive 90-page opinion reflecting a meticulous review of the Record on Appeal, which included a 35-volume Joint Appendix consisting of 16,489 pages, the Second Circuit unanimously affirmed the jury verdict that AT&T had monopolized and attempted to monopolize the relevant market, each sub-finding of anticompetitive conduct, and the damage award. It found the evidence "sufficient, both in terms of its weight and from the standpoint of causation," and commended the trial court for its handling of this "complex" and "difficult" case as "a model of judicial technique." Pet. App. 6a-7a, 58a.

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[7] The trial court, before discharging the jurors, praised them for being "extremely attentive" throughout the trial and for their "thoughtfulness and conscientiousness" in reaching their verdict, concluding that they had been "a vindication of the jury system and all that it means." A 6401.

1. Raising a "score of issues" on appeal (Pet. App. 6a),[8] AT&T attacked not only the sufficiency of the evidence, but also various evidentiary rulings of the trial court, Litton's damage study, the award of damages to Litton as a customer, and the legal and factual bases for the rejection of its *Noerr-Pennington* defense. Noting that "there is little in this case that the parties agree upon," the court reviewed the evidence with respect to each of the jury findings and found that it provided a reasonable and adequate basis for the jury's conclusions. *Id.* at 33a, 58a, 63a. After considering each of AT&T's objections, the court held the trial court's instructions and evidentiary rulings were "free from prejudicial error." It also found no merit in AT&T's attack on the verdict for Litton as a customer. *Id.* at 6a-7a. As for the damage study, the court found that it was "supported by the record and not based on assumptions as to evidence not in the record." *Id.* at 83a. It further noted that the award of $91,990,000 was "modest in light of the fact that Litton's lost profits were limited to years prior to 1978" (*id.* at 85a), and pointed out that Litton sustained out-of-pocket losses alone of $53 million. *Id.* at 77a.

2. The Court of Appeals rejected AT&T's *Noerr-Pennington* doctrine argument on two independent grounds. Pet. App. 38a-42a. First, the court held that as a matter of law the *Noerr-Pennington* doctrine did not apply to AT&T's private decisions to impose and to maintain its interface device requirement, because merely disclosing that requirement in a tariff filing was not a "request" for governmental action or an "expression" of political opinion protected by the First Amendment. *Id.* at 44a-

[8] On the appeal, as here, AT&T did not dispute that it had monopoly power in the relevant market. It also made no claim that its monopoly was achieved or maintained through competitive superiority.

45a.[9] Second, the court unanimously held that even if the *Noerr-Pennington* doctrine applied, AT&T's conduct fell within the "sham exception" to that doctrine because AT&T made repeated baseless claims of harm to the network, misrepresented facts to the FCC, withheld critical information requested by the FCC, and impeded the work of the Commission's PBX Advisory Committee. *Id.* at 50a-53a. These efforts, the court concluded, constituted an "abuse of the administrative process that [fell] within the *Noerr-Pennington* sham exception." *Id.* at 54a. Accordingly, on this factual review, it sustained the jury's determination. *Id.*

3. In a lengthy petition for rehearing with suggestion for rehearing in banc, AT&T restated its factual arguments and claimed that the court misread the FCC decisions and that AT&T's conduct in opposition to the replacement of its interface device with standards was immune from antitrust liability under the *Noerr-Pennington* doctrine. The rehearing petition was unanimously denied, and not a single Second Circuit judge in regular active service requested that a vote be taken on the suggestion for rehearing in banc. Pet. App. 134a.

REASONS FOR DENYING THE WRIT

None of the considerations governing review on certiorari, as set forth in this Court's rules, supports the grant of the requested writ. The jury verdict and the Second Circuit's opinion are wholly consistent with settled law under the Sherman Act and the First Amendment. The decision below is not in conflict with any pertinent decisions of this Court or other Courts of Appeals. Nor is any issue of general or national importance presented by the petition.

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[9] One member of the panel did not concur on the first ground but did agree with the court on the second ground that AT&T's conduct clearly fell within the "sham exception" to the *Noerr-Pennington* doctrine. Pet. App. 42a. *See infra* pp. 21-22.

I. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH *NOERR-PENNINGTON* PRINCIPLES OR PRECEDENTS

Having adopted exclusionary practices specifically designed to establish and maintain its equipment monopoly and having had its asserted justifications for them over the course of several decades finally exposed as baseless in a five-month trial, AT&T here seeks to characterize this case, quite incredibly, as a First Amendment case. In its petition, AT&T raises as its main issue the claim that it has suffered an antitrust judgment because it "exercised its constitutional right to express its opinion . . . by making a public speech and by filing pleadings" with the FCC. Pet. 2-3.

This is not a First Amendment case. Litton was not driven out of business by something AT&T said or by something the FCC did as a result of AT&T's advocacy. The judgment against AT&T is based on what AT&T did on its own in adopting, imposing and enforcing its interface device requirement for competitors' equipment. In erecting and maintaining this artificial barrier to competition, AT&T relied not on any FCC rulemaking or adjudicative authority, but on its own monopoly power over the telephone network, which it unlawfully extended to the terminal equipment market.

AT&T's *Noerr-Pennington* argument was thoroughly considered and rejected by the court below. Pet. App. 38a-58a. The Second Circuit agreed with Litton that there were two independent, alternative grounds for its rejection: (1) "*Noerr-Pennington* is inapplicable because AT&T injured Litton not by requesting or as a result of governmental action, but by virtue of what AT&T itself did in filing and maintaining the interface tariffs while opposing the only feasible alternative—certification standards—in bad faith," or in the alternative (2) "this case presents a 'paradigm of the "sham" exception to the *Noerr* doctrine.' " *Id.* at 42a.

A. The *Noerr-Pennington* Doctrine Does Not Apply to This Case

Contrary to AT&T's principal argument (Pet. i, 2, 20, 23-24), Litton was not injured by AT&T's "legitimate advocacy" or expressions of "political opinion" but by AT&T's private business decisions to file and maintain the interface device requirement and oppose standards in bad faith, for the express purpose—and with the direct effect—of preventing competition and maintaining its monopoly over the terminal equipment market. As the Second Circuit said: "The decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC." Pet. App. 44a. Since "AT&T's power to exclude" competitors from the market "resulted not from the FCC's regulatory authority but from AT&T's exclusive control over the telephone network," the Second Circuit properly ruled that "AT&T cannot cloak its actions in *Noerr-Pennington* immunity simply because it is required, as a regulated monopoly, to disclose publicly its rates and operating procedures." *Id.*

The filing of the interface tariff was an exercise of AT&T's independent business judgment and initiative; it was not required or instituted by the FCC.[10] The same

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[10] The Second Circuit observed that this same conclusion had been reached by the other courts which had considered the question. Pet. App. 44a-45a. *See, e.g., Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 735 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 785 (1983) ("To the extent the carrier's conduct [in imposing the interface device] violates the FCA, those actions were neither compelled by the FCC nor adopted as agency policy, . . . it is the product of the regulated entity's independent initiative and judgment." (footnote omitted)); and *Sound, Inc. v. AT&T Co.*, 631 F.2d 1324, 1330 (8th Cir. 1980) ("Bell, not the FCC, proposes its rates, regulations and restrictions, subject, of course, to FCC approval. In filing each tariff, Bell implements its own business judgment in regard to its relationship with competitors.").

For similar statements by other courts, see *Northeastern Telephone Co. v. AT&T Co.*, 651 F.2d 76, 83-84 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Essential Communications Systems, Inc. v. AT&T Co.*, 610 F.2d 1114, 1124 (3d Cir. 1979); *United States*

is true of its maintenance of the exclusionary interface tariff for 10 years. AT&T could have revoked it at any time simply by filing another tariff. Pet. App. 45a n.32; *United States v. AT&T* Co., 524 F. Supp. at 1350 n.47.

AT&T's bad faith opposition to certification standards was just another means used by AT&T to perpetuate the interface device barrier to competition. AT&T's private action in filing and maintaining the interface device requirement, the Second Circuit said, "was the very embodiment of opposition" to equipment standards, the "only feasible alternative." Pet. App. 47a. AT&T's "opposition" was thus much more than merely "espousing a position before an administrative body." *Id.* It was, as the court added, "simply the other side of the interface tariff coin" (*id.*), since the "effect" of the opposition "was to maintain the interface tariffs and whatever anticompetitive or exclusionary effect that flowed therefrom." *Id.* at 48a.

In holding the *Noerr-Pennington* doctrine inapplicable, the Second Circuit pointed out that this case was similar to *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), "because AT&T was 'engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws.'" Pet. App. 44a. Further, as this Court stated in *Continental Ore*, in language equally applicable here, imposing Sherman Act liability "for eliminating a competitor from the . . . market by exercise of the discretionary power" retained by defendants under regulation "would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr*." 370 U.S. at 707-08.

The Second Circuit also followed *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976), where a plurality of this Court rejected the same *Noerr-Pennington*

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v. AT&T Co., 524 F. Supp. 1336, 1350 n.47 (D.D.C. 1981); *Litton Systems, Inc. v. AT&T Co.*, 487 F. Supp. 942, 956-57 (S.D.N.Y. 1980).

argument that the filing of a tariff was a protected "request" for governmental action. There *Noerr* was held to be inapplicable to private action taken in compliance with state law, even where that action was approved by the regulatory authority. This Court stated:

> [N]othing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.

428 U.S. at 601-02.

Here, of course, the interface tariff was never even approved by the FCC and, when the FCC ruled on its validity, it was found to be "unlawfully" restrictive and discriminatory, unjust and unreasonable. Res. App. 81a, 89a. As the court below stated: "The fact that the FCC might ultimately set aside a tariff filing does not transform AT&T's independent decisions as to how it will conduct its business into a 'request' for governmental action or an 'expression' of political opinion." Pet. App. 44a-45a.

The Second Circuit's reliance on *Cantor* is consistent with the Eighth Circuit's decision in *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1180-81 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 814 (1983). Pet. App. 45a-46a. There, the Eighth Circuit held that filing tariffs disclosing electric rates did not confer *Noerr-Pennington* immunity for the decisions to set those rates because it was not the "expression of opinion" that allegedly injured the plaintiff but defendant's "conduct in the market place." 671 F.2d at 1181.[11] On petition for certiorari

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[11] *Accord, Mid-Texas Communications Systems, Inc. v. AT&T Co.*, 615 F.2d 1372, 1382-83 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980) (refusal to interconnect with another telephone company not within the *Noerr-Pennington* doctrine as action "in an essentially

in *City of Kirkwood*, the Solicitor General, in a brief filed at the invitation of this Court, expressed the views of the United States that "reliance on *Cantor* was appropriate"; that *Noerr-Pennington* was thus "inapplicable" as a matter of law to defendant's "private conduct" in establishing the rates; and that the petition should be denied. Brief for the United States as Amicus Curiae, Res. App. 10a, 11a, 12a n.11, 18a. That petition was denied this term.

In every case cited by AT&T where the application of the *Noerr-Pennington* doctrine has been upheld, the defendant endeavored to injure his competitor, not through private action, but through governmental action or decision.[12] Thus, there is no conflict between the decision

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private context"); *United States v. Title Insurance Rating Bureau of Arizona*, 517 F. Supp. 1053, 1059-60 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983).

[12] In five of the six cases cited by AT&T (Pet. 21 n.13, 22 n.15), the plaintiffs' injury flowed from governmental action (or inaction) taken as a result of defendants' efforts to influence the decision making body, not as a result, as here, of defendants' private anticompetitive conduct. *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 262, 267-68, 272 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982) (claimed injury caused by "governmental action" including promulgation and enforcement of regulations by state agencies inhibiting mail order pharmacies and enforcement of state law by state board through injunction proceeding and withholding and revocation of license); *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 295-97 (8th Cir. 1978) (claimed injury caused by city government's refusal to reopen airport); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1078, 1081 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (claimed injury caused by city agency's refusal to issue building permits); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 229, 232 (7th Cir. 1975) (claimed injury caused by city council's refusal to award cable television franchise); *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1363, 1365 (10th Cir. 1972) (claimed injury caused by injunction obtained by state motor vehicle commission enjoining violations of state law). In the sixth case, *Mid-Texas*, *see supra* note 13, the court held that AT&T's independent refusal to

of the Second Circuit here and any decisions of this Court or the other circuits. The court below understood the principles of *Noerr* and *Pennington* and applied them in the same manner as did this Court in *Continental Ore* and *Cantor.*

B. The Trial Evidence Fully Established that AT&T's Conduct Fell Within the Sham Exception

The Second Circuit did not rest its rejection of AT&T's *Noerr-Pennington* defense only on its inapplicability as a matter of law; it decided unanimously that even if *Noerr-Pennington* applied, the trial evidence in this case overwhelmingly showed that AT&T's conduct came within the "sham exception." Noting that the sham exception was presaged by this Court in *Noerr,* the Second Circuit turned to *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972), where this Court spelled out the parameters of the sham exception. Where "the administrative and judicial processes [are] abused" in an effort to injure competition, this Court said, *Noerr-Pennington* immunity is denied. *Id.* at 513; Pet. App. 48a-49a. This Court identified "many" forms of "abuse" involving "the administrative or judicial processes" that could not "acquire immunity by seeking refuge under the umbrella of 'political expression.' " 404 U.S. at 513. Two forms of such abuse specifically mentioned were "baseless, repetitive claims" and "misrepresentations." 404 U.S. at 513. *See Landmarks Holding Corp. v. Bermant,* 664 F.2d 891, 894, 896 (2d Cir. 1981). Another form of abuse is the suppression and concealment of information from an agency. *Israel v. Baxter Laboratories, Inc.,* 466 F.2d 272, 274, 278-79 (D.C. Cir. 1972). Each form of abuse may show that the "antitrust defendant had not truly sought to influence a governmental decision" but that it used the process to

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interconnect was not within the *Noerr-Pennington* doctrine. The court, however, found that AT&T's defense of a complaint filed with the FCC was protected by *Noerr-Pennington* because there was no evidence of sham conduct. 615 F.2d at 1383-84.

delay and impede his competitors in the market. P. Areeda, *Antitrust Law* ¶ 203.1a (Supp. 1982).[13]

Applying these principles to the facts of this case, the court below decided, after a thorough and independent review of the trial record, that the evidence amply supported the jury's determination that AT&T's conduct "amounted to the sort of abuse of the administrative process that falls within the *Noerr-Pennington* sham exception." Pet. App. 54a, 58a. In its opinion the court highlighted some—but by no means all—of the evidence supporting the jury's conclusion. The court specifically pointed to trial evidence showing "that AT&T's ongoing claim of harm to the system was baseless"; that AT&T, in its representations, "affirmatively misled the FCC"; and "that AT&T did what it could to delay and obfuscate the efforts undertaken by the FCC and other interested parties to develop certification standards." *Id.* at 51a-53a. *See also id.* at 48a.[14] Finding this evidence compel-

[13] Other antitrust commentators recognize the dangers of abuse of administrative processes through misrepresentation and baseless claims interposed to deter competitors. *E.g.*, R. Bork, *The Antitrust Paradox* 353-55, 359-60 (1978); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 122 (1977).

[14] The sham evidence constituted only a small part of the total body of evidence proving AT&T's bad faith opposition to certification. Instead of being limited to what AT&T did before the FCC in 1973, as AT&T claims (Pet. at 9-10), the basic trial evidence of bad faith opposition to standards covered a ten-year period going back to the *Carterfone* period. In 1967, AT&T's management created a special task force to develop "the strongest possible case to resist . . . customer ownership" of terminal equipment. A 4070-84, 4088-92, 11698, 11972. That task force reported to management that an interface device requirement "would erect a redundant, artificial and economic barrier to those wishing to purchase their own equipment" and, therefore, that the "entire concept of customer-owned equipment must be based on tariff type-approval" [*i.e.*, *standards*]. A 11995. However, AT&T's top management refused to issue standards and embarked on a program to require the interface device and delay any standards program even though,

ling, the court stated: "As a textbook example of a monopolist in control of an essential facility, *see United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), it is difficult to conclude that these efforts could not have amounted to an abuse of the administrative process." *Id.* at 53a.

AT&T does not claim here that the Second Circuit misapprehended the proper legal standard for the sham exception. Instead, in its petition it makes a disjointed attack in text and footnotes on the court's evaluation of the trial evidence, in effect remaking its closing jury argument as to the meaning, weight and significance that should be attached to selected items of the sham evidence. Pet. 17, 24, 25, 26 and n.17. In doing so, AT&T not only ignores but violates the standard of review for an appellate court—that the trial evidence must be viewed in the light most favorable to the prevailing party, giving it "the benefit of all inferences which the evidence fairly supports," regardless of whether contrary inferences might be drawn. *Continental Ore*, 370 U.S. at 696; Pet. App. 50a-51a.

Without attempting to address all of AT&T's mischaracterizations of the evidence, two egregious examples need answering. First, AT&T claims that the Second Circuit relied "primarily" on a public speech by AT&T Chairman deButts as evidence of AT&T's sham conduct. Pet. 10-11, 23-24, 26. This is simply incorrect. Litton never claimed and the Second Circuit did not find that

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throughout the succeeding years, AT&T's top management was told repeatedly that standards were inevitable (A 10435, 11001, 7337-38, 16192, 1991-96, 2282-85, 7373, 7310, 8110-11), that AT&T had no proof of harm to the network (A 10348-49, 8006, 8037, 8061, 8048), that AT&T had been unable to respond to the FCC's requests for harm data (A 10353-54), and that a certification program would be "as effective in protecting the network—and perhaps more effective" than its interface device. A 7492, 1928-30, 1933-34, 2003-04. The trial evidence was summarized in the opinion below and reviewed in much greater detail in Litton's main brief to the Second Circuit. Pet. App. 4a-33a.

the deButts speech itself constituted sham activity. *See* Pet. App. 52a. In fact, the speech did not involve advocacy before the FCC or any state agency but was made at the national convention of a trade association of regulators in Seattle.

The speech was evidence of AT&T's intent to maintain its monopoly. In this speech deButts revealed publicly AT&T's previously adopted policy to fight competition to the bitter end. A 1868-71, 1877-78, 1982-83.[15]

Further, the circumstances surrounding the preparation of the speech were relevant in showing that AT&T did make deliberate misrepresentations to the FCC in a subsequent filing. When a draft of the speech was prepared, it stated that "current studies" supported AT&T's claim of harm. AT&T's top technical expert (Goldstein), who reviewed the draft, warned that those studies did not "prove anything" and that they should not be used in the speech. A 2263-73. Even the author of the studies (Hunt) admitted at trial that they "did not furnish any evidence" that competitive equipment was more harmful than AT&T equipment. Tr. 2002.

Despite this knowledge, the speech was not changed and deButts delivered it with the misrepresentations about harm.[16] Four weeks later, in its formal submission to the FCC opposing standards in any form, AT&T, relying on the same Hunt studies, made the same misrepresentations, only in stronger terms, stating that these studies showed that customer-provided equipment caused "real" and "actual" harm to the network. A 13170, 13206.

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[15] This corporate policy was adopted by deButts with full awareness of its antitrust consequences. Right after delivering the September 1973 speech, deButts admitted in private meetings within the Bell System that his Seattle speech had "contributed more to employment opportunity in the legal profession than did Messrs. Sherman, Clayton, Wright and Patman combined." A 7939; *see also* A 7934.

[16] Prior to delivering this 1973 speech, deButts and other top AT&T officials had been repeatedly told that there was no proof of harm to the network. A 8037, 8061, 10348-49, 10353-54.

Second, AT&T in its petition claims that the Second Circuit opinion is based upon the "single erroneous premise" that the *Carterfone* decision [redacted] permitted customers to provide their own terminal equipment. AT&T bases this argument on a few phrases taken out of context from two post-*Carterfone* FCC decisions while it ignores the basic ruling of those decisions confirming the broad principle of *Carterfone* and *Hush-A-Phone* that AT&T could not bar customers from using harmless equipment. Pet. 3, 6, 7, 13, 17, 30.

This claim was the basis of AT&T's argument before the jury that it acted in good faith when it rejected standards and filed its interface device tariff in 1968. The jury had before it all of the pertinent FCC decisions and the evidence from AT&T's top executives and contemporaneous documents showing that AT&T acted with full knowledge that standards were the best way to protect the network, that the interface device would be a "redundant, artificial and economic barrier" to competition, A 11995, and despite the warning of its own regulatory experts that it was "not at all responsive" to *Carterfone*. A 7206. *See supra* note 14. The jury rejected AT&T's argument and in answers to special interrogatories found that AT&T acted in bad faith. Both the trial court and the Second Circuit affirmed this determination. Pet. App. 13a, 22a n.12, 48a-54a.

This argument by AT&T has fared no better in other courts. Six years ago AT&T made this same argument to the Fourth Circuit in *North Carolina Utilities Commission v. FCC* where it was rejected and AT&T repeated it in its unsuccessful petition for certiorari to this Court. *See* discussion *supra* pp. 8-9. More recently, the Ninth Circuit rejected it in *Phonetele, Inc. v. AT&T Co., see supra* note 10, where the court affirmed, after extensive discussion, its earlier 1975 holding "that while the precise holding of *Carterfone* did not decide the issue of customer replacement of NCSU equipment, the broad

and binding principle of *Carterfone*, and *Hush-A-Phone* before it, applied to *all* telephone equipment." 664 F.2d at 730-31 (emphasis in original); *see also id.* at 724 and n.20. AT&T repeated this argument in its petition for certiorari in *Phonetele*, which was denied this term.

The Second Circuit here recognized (Pet. App. 10a), as had the Ninth Circuit, that the 1956 Court of Appeals' decision in *Hush-A-Phone* was controlling and that it laid down the broad principle of law that only harmful equipment could be barred from interconnection with the telephone network. In subsequent decisions, including both *Carterfone* decisions, the *First*, *Second* and *Third Reports* in Docket 19528, and the *Primary Instrument* opinion, the FCC applied this legal principle, as it was required to do. *See discussion supra* pp. 4-10. Significantly, AT&T's petition does not mention the Court of Appeals' decision in *Hush-A-Phone*—not even once.

Moreover, the Second Circuit's decision is not based upon a "single premise" or upon the *Carterfone* reconsideration decision alone but upon an examination and an assessment of the totality of the evidence that properly integrated the regulatory decisions with the evidence of AT&T's actual intent and conduct. *See* Pet. App. 50a-51a. Thus, AT&T's argument, besides being contrary to the decisions of the FCC and three federal courts of appeals, simply ignores the evidentiary context in which the jury and the Second Circuit reached their decisions.[17]

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[17] Other errors and misstatements in the petition include AT&T's claims (1) that the interface device tariff was never held "illegal", Pet. 4 (*Fact*: The FCC specifically held the tariff unlawful in *First Report*, Res. App. 56a; *Second Report, id.* at 89a; and *Third Report*, A 6710, 6727); (2) that economic issues delayed certification, Pet. 13 n.6, 27 (*Fact*: The economic issues were settled in 1968 *Carterfone* decision. *See Second Report* at 81a-82a and *First Report* at 58a-59a); (3) that the Second Circuit holding rests on the conclusion that *Noerr* doctrine "only applies to attempts to obtain affirmative governmental action" and not to petitioning to maintain an anticompetitive *status quo*, Pet. 20-21 (*Fact*: The Second Circuit did not make such a distinction, and Litton never urged it); and (4) that

Unable to demonstrate any conflict between the decision below and the decisions of this Court or any other circuit court on the sham exception or its application, AT&T is reduced to arguing that the Second Circuit's decision conflicts with a footnote in District Judge Greene's opinion denying AT&T's motion to dismiss at the close of the Government's case in *United States v. AT&T Co.*, 524 F. Supp. at 1363 n.110. Pet. 22-23. A comparison of the two decisions, however, discloses no conflict. The sham exception standards applied by Judge Greene are the same as those applied by the Second Circuit. *Compare* 524 F. Supp. at 1364 with Pet. App. 48a-54a. Judge Greene found that, where the evidence showed that "AT&T's sole purpose" in a proceeding was to "preserve its monopoly and that it well knew that the positions it took before the FCC were baseless," there was no *Noerr-Pennington* shelter. 524 F. Supp. at 1364. This is exactly what Litton proved.[18]

Judge Greene's decision, moreover, is fully consistent with the jury's finding, and the decision below upholding that finding, that AT&T wilfully maintained its terminal equipment monopoly through the filing and maintenance

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the sham exception does not apply where a party "respond[s]" to rather than "initiate[s]" the agency proceeding, Pet. 23 (*Fact*: Initiating as well as responding to administrative proceedings may entail abuse of that process. *See, e.g., Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755, 757, 762 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972)).

[18] AT&T incorrectly states that Judge Greene had before him in the Government case the "same" or "identical" evidence of AT&T's sham activities involving the FCC that was presented to the jury in the *Litton* case. Pet. i and 23. The important testimony of such key witnesses in *Litton* as Birck (Tr. 9539-9769), Hohmann (Tr. 9003-9537, 10202-10380), Irwin (Tr. 5954-6133, 16637-16691, 16768-16865), Neuschel (Tr. 2909-3130), Goldstein (Tr. 3351-3614, 8138-8996), Brown (Tr. 7958-8036, 8113-8129), and Bonsack (Tr. 3883-3926) and many of the numerous exhibits on which they were examined were not offered by the Government in its case. Thus, Judge Greene did not have before him the specific evidence on which the *Litton* jury relied.

of the interface device tariff rather than the issuance of standards. He held that "AT&T's failure to propose a certification [*i.e.*, standards] program for customer-provided equipment" could not "conceivably be construed as petitioning for governmental action." *Id.* at 1363 n.110.

Consistent with the Second Circuit (Pet. App. 44a), Judge Greene recognized that the interface "tariffs were [AT&T's] own creation, and they could have cancelled them at any time." *Id.* at 1350 n.47. He concluded that "on a factual basis, the government's terminal equipment interconnection case presently stands unimpeached." *Id.* at 1351. In fact, after having offered almost all of its defense case, AT&T consented to the divestiture of all of its operating companies comprising 75% of its assets with a value of $45 billion. *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 103 S. Ct. 1240 (1983).

II. THE PETITION RAISES NO ISSUE OF PUBLIC OR NATIONAL IMPORTANCE

AT&T's petition presents no new or novel issue under the First Amendment or the *Noerr-Pennington* doctrine. At most, this case involves a straightforward application of the sham exception to the facts of this case. None of the issues raised in the special factual context of this case are likely to arise again in view of the consent decree that has been entered in the Government case against AT&T. Under the terms of that decree AT&T is required to divest all of its local operating companies on January 1, 1984, and in consequence, AT&T will no longer be able to use its exclusive control over the local telephone network to exclude competition from the terminal equipment market. *See* Pet. App. 44a, 53a.[19]

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[19] As for certain other antitrust cases currently pending against AT&T which are collected at page 28 n.20 of AT&T's petition, those cases will have to be resolved on the basis of their particular pleadings and factual records. Whether collateral estoppel should be

As for the three so-called "related issues" tagged on to the end of its petition, AT&T admits that these issues are not independently worthy of review but should be taken only if the main issue is reviewed. Pet. i and 27. In no event, we submit, do any of these issues raise concerns of national importance or otherwise warrant review.

First, AT&T contends that the *Noerr-Pennington* issue was improperly submitted to the jury under instructions that did not "state that advocacy is protected, regardless of anticompetitive purposes." Pet. i and 27. AT&T misstates the instructions. The *Noerr-Pennington* instruction given by the trial court did inform the jury that AT&T could "seek" governmental action which "would be harmful to competition." A 6275-78. Moreover, as the court below pointed out, AT&T's argument is predicated on singling out a part of one instruction that was not the *Noerr-Pennington* instruction, and is "answered by reviewing the jury instructions, as we must, in their totality." Pet. App. 54a-55a. After so reviewing the jury instructions, the court below concluded that the instructions "accurately . . . tracked the Supreme Court's explication of the sham exception" and were not erroneous. *Id.* at 57a.

Second, AT&T contends that its conduct "cannot be held to violate the antitrust law if it was a reasonable attempt to comply with the then existing state and federal regulatory requirements." Pet. 27. AT&T did not raise this issue on appeal below. In any event, the jury considered AT&T's actions and found them to be unreasonable under the antitrust laws, just as the FCC considered the same actions and found them unreasonable under the Communications Act. Finally, the jury rejected AT&T's defense of reasonableness under a proper instruction that it should consider "regulation" and the regulatory rul-

applied in any of those cases is a matter left to the discretion of the trial judge under the standards established by this Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

ings in evidence as factors in determining the "purpose and reasonableness of the defendants' acts and practices." A 6255.

Third, AT&T asserts that Litton was not entitled to sue for antitrust damages as a user of the interface device under the "filed tariff doctrine" of *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922). Pet. 28. But as the court below held, the *Keogh* doctrine does not apply where, as here, the regulatory agency "disapproved" the tariff, and the issue here was not the reasonableness of the rate but "whether there should have been any charge at all." Pet App. 73a-74a and the cases cited therein.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 28, 1983

No. 82-2128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

v.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Brief for the United States as Amicus Curiae in
***Union Electric Company* v. *City of Kirkwood*,**
103 S.Ct. 814 (1983)

No. 81-2278

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNION ELECTRIC COMPANY, PETITIONER

v.

CITY OF KIRKWOOD, MISSOURI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a utility that charges wholesale and retail rates at levels that unfairly prevent its competitor-customers from competing with it ("price squeeze" conduct) is immune from the antitrust laws under the *Noerr-Pennington* doctrine solely because the rates were filed with state and federal regulatory agencies that did not order any changes creating or increasing the alleged anticompetitive effect.

2. Whether such an alleged "price squeeze" is immune from the federal antitrust laws by implication from the Federal Power Act, which creates no express antitrust exemption for wholesale electric rates subject to regulation by the Federal Energy Regulatory Commission and which confers no authority on FERC to regulate retail rates.

3. Whether such an alleged "price squeeze" is immune from the federal antitrust laws under the "state action" doctrine, where the conduct at issue is the result of essentially private decisions not compelled by the state, the state has articulated no policy in favor of the conduct at issue, and the state has no authority to regulate wholesale rates.

4. Whether electricity is a "commodity" within the meaning of the Robinson-Patman Act.

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2278

UNION ELECTRIC COMPANY, PETITIONER

v.

CITY OF KIRKWOOD, MISSOURI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Union Electric Company (UE) is an electric utility that produces, transmits, and delivers electric power to wholesale and retail customers in Missouri, Iowa, and Illinois (Pet. App. A-3). Respondent (Kirkwood), a municipal corporation, sells electric power at retail to customers in approximately two-thirds of its geographic area (*ibid.*).

Kirkwood does not produce electricity, but buys it at wholesale from UE. Customers in the area of Kirkwood not served by the municipal distribution system buy power at retail from UE (*ibid.*).

UE's *wholesale* rates are regulated by the Federal Energy Regulatory Commission (FERC)[1] under the Federal Power Act, 16 U.S.C. (& Supp. V) 824 *et seq.* UE's *retail* rates are regulated by the Missouri Public Service Commission under Mo. Ann. Stat. ch. 393 (Vernon 1952 & Cum. Supp. 1982).

The Federal Power Act requires that all rates subject to FERC's jurisdiction be just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). Public utilities, such as UE, must file with FERC "schedules showing all [wholesale] rates and * * * all contracts which in any manner affect or relate to such rates." 16 U.S.C. 824d(c). Before making any modification of such rates, the utility must give 60 days notice to FERC and the public. 16 U.S.C. (Supp. V) 824d(d). On complaint or on its own initiative, FERC may order a hearing into the lawfulness of a filed rate change and may suspend the proposed change for up to seven months. 16 U.S.C. (Supp. V) 824d(d) and 16 U.S.C. 824d(e).[2] If FERC does not order a hearing on a proposed rate change, the new rate takes effect at the end of the 60-day notice period.

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[1] Prior to October 1, 1977, the Federal Power Commission (FPC) had essentially the same statutory authority insofar as is here relevant. References to FERC in this brief should be interpreted, where appropriate, as referring to the FPC.

[2] If a hearing is not completed before the expiration of the suspension period, the proposed rate schedule takes effect, but FERC may require the utility to refund with interest any portion of the increase subsequently found "not justified."

In addition, on its own motion or on complaint, FERC may order a hearing to determine whether any previously established rate or contract is "unjust, unreasonable, unduly discriminatory or preferential"; if it finds that it is, FERC may establish a just and reasonable rate or contract that the utility must observe. 16 U.S.C. 824e(a).

Missouri state law requires that utilities file their *retail* electric rates with the Missouri Public Service Commission (PSC). A retail rate cannot go into effect until the PSC approves it, but the PSC must act within 11 months after a rate proposal is filed. Mo. Ann. Stat. § 393.150 (Vernon Cum. Supp. 1982). The standard applied by the PSC in deciding whether to approve a rate is whether it is unjust, unreasonable, unjustly discriminatory, or unduly preferential. Mo. Ann. Stat. § 393.140(5) (Vernon Cum. 1982).

2. On September 1, 1977, Kirkwood filed a complaint alleging that UE had violated the Sherman Act, 15 U.S.C. 1 *et seq.*, and the Robinson-Patman Act, 15 U.S.C. 13 *et seq.* It sought damages and injunctive relief. The complaint alleged that UE had monopolized and attempted to monopolize the retail distribution and sale of electric power by imposing an anticompetitive "price squeeze" [3] on Kirkwood

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[3] A "price squeeze" may arise in a situation in which a firm competes with its supplier. In the present case, Kirkwood is a retailer that competes with its wholesale supplier, UE, for retail business. Thus, if UE raises its wholesale prices to Kirkwood, but maintains its retail prices at a level that would not allow Kirkwood to make a profit based on its increased wholesale costs, then Kirkwood is subjected to a "price squeeze." Whether a "price squeeze" is anticompetitive depends on a number of factors, including the relative efficiency of the competing firms and whether the price relation complained of is attributable to the supplier's conduct rather than forced on the supplier by a public authority.

by manipulating the relationship between its wholesale rate to Kirkwood and its retail rates. In 1975, UE was alleged to have increased its wholesale rate for electric power by more than 33% while taking no action to increase its retail rates. Pet. App. A-30. As a result, Kirkwood alleged, it "paid approximately 35 percent more than Union was selling comparable power at retail to its large industrial primary service customers." *Ibid.* This practice, Kirkwood alleged, was similar to previous UE rate practices. Although UE subsequently increased its retail rates and reduced its wholesale rates somewhat (as a result of settlement of FPC proceedings), it was Kirkwood's contention that the price squeeze continued. *Id.* at A-31.

According to Kirkwood, the price squeeze caused antitrust injury by precluding Kirkwood from competing with UE for retail sales.[4] The complaint also alleged that the disparity between UE's wholesale and retail rates had substantially lessened competition between UE and Kirkwood, thus violating the Robinson-Patman Act, 15 U.S.C. 13(a).

3. The district court granted summary judgment for UE. Pet. App. A-19 to A-24.[5] The court held that

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[4] Kirkwood alleged that it was precluded from "selling power to its customers at retail at the same rates charged by [UE] at retail without impairing the traditional benefits derived by [Kirkwood] from its municipally owned system" (Pet. App. A-30 to A-31), and that this "result[ed] in a loss of revenues and/or pressure on the citizens and officials of [Kirkwood] to discontinue operating the utility and to offer to sell or lease it to [UE]" (*ibid.*).

[5] The district court had previously dismissed the Robinson-Patman Act claim on the grounds that electricity is not a "commodity" within the meaning of the Act and that the

Kirkwood's exclusive remedy for the alleged price squeeze was with the state and federal regulatory agencies. UE's rates, the court also held, were exempt from antitrust challenge because they were subject to federal regulation under the Federal Power Act and state regulation by the Missouri PSC. Finally, the court held that UE's filing of tariffs with FERC and the state commissions, and its collection of rates pursuant to those tariffs were immune from antitrust liability under the First Amendment and the *Noerr-Pennington* doctrine.[6]

4. The court of appeals reversed. It held that FERC and PSC did not have exclusive jurisdiction over the price squeeze claim. Pet. App. A-6 to A-11. Rather, the court held, under this Court's decisions in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), and *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973) (*Otter Tail*), the antitrust laws are applicable to regulated utilities and an award of antitrust damages would not infringe on FERC's regulatory jurisdiction. The court of appeals further held that the price squeeze claims were not immunized by the state action doctrine because there was no legislative policy favoring the conduct at issue and because the interrelation of the wholesale and retail rates was not controlled by regulatory authorities. Finally, the court held that there was no immunity under *Noerr-Pennington* because: "It is not for expression of

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complaint did not sufficiently allege sales in interstate commerce. Kirkwood moved for reconsideration of that order, but the district court granted summary judgment in favor of UE without specifically ruling on that motion.

[6] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (*Noerr*); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) (*Pennington*).

opinion that Kirkwood seeks to compel UE to respond in damages, but rather for UE's conduct in the market place." Pet. App. A-14 to A-15.[7]

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.[8] Review by this Court is therefore unwarranted.

1. Petitioner argues first that the alleged price squeeze [9] is immunized from antitrust scrutiny by the *Noerr-Pennington* doctrine. This argument was properly rejected by the court of appeals. The *Noerr-Pennington* doctrine reflects this Court's conclusion that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Noerr, supra*, 365 U.S. at 135.

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[7] The court of appeals also held that electricity is a "commodity" for purposes of Kirkwood's Robinson-Patman Act claim.

[8] The court of appeals did not address the merits of respondent's antitrust claims. The fact that petitioner's conduct is not exempt from the antitrust laws does not, of course, establish an antitrust violation. See *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 n.5 (1979); *Union Labor Life Insurance Co.* v. *Pireno*, No. 81-389 (June 28, 1982), slip op. 5.

[9] A firm that has monopoly power is said to have engaged in a "price squeeze" and has violated Section 2 of the Sherman Act, 15 U.S.C. 2, if it discriminates against customers who are its competitors in another market (i.e., charges them higher prices not justified by differences in costs), if that discrimination unduly impedes competition, and if the monopolist's pricing is intended to have that effect. See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 436-438 (2d Cir. 1945).

In other words, Congress did not intend the antitrust laws to apply to attempts by private parties to obtain government action that would restrain competition—even where the result is subsequent government action that in fact imposes such a restraint.

Noerr-Pennington is inapplicable here, however, because Kirkwood did not base its complaint on the results of restrictive governmental action sought by UE or on UE's efforts to obtain such governmental action. Kirkwood does not challenge the legality of either the wholesale rate approved by FERC or the retail rate approved by the Missouri PSC. Rather, Kirkwood has alleged that it was injured by the relationship between those rates, decided upon and put into effect by a private party, UE, for the purpose of eliminating Kirkwood as a competitor. Since no regulatory body imposed, or had jurisdiction to impose, the combination of rates whose competitive effect is challenged, petitioner's *Noerr-Pennington* arguments were properly rejected by the court of appeals.[10]

Petitioner's argument that such private conduct is immunized merely because UE obtained governmental acquiescence or approval constitutes an unwarranted attempt to expand the *Noerr* doctrine, and is directly contrary to this Court's holding in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976), that anticompetitive conduct pursuant to a tariff filed with a regulatory body is not immune from antitrust scrutiny.[11] See also *California* v. *FPC*, 369 U.S. 482, 488-

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[10] A similar *Noerr-Pennington* defense to a price squeeze claim was rejected by the Seventh Circuit in *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 981-983 (1980), cert. denied, 449 U.S. 1096 (1981).

[11] Petitioner contends (Pet. 7) that the court of appeals' reliance on *Cantor* was unjustified because the Court's refer-

489 (1962); *United States* v. *RCA*, 358 U.S. 334, 350-352 (1959). Indeed, in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), this Court held that private actions designed to influence rates that are subject to regulation are not immune from the antitrust laws because of subsequent regulatory adoption of the rates—a holding that has not been overruled by *Noerr* or any other decision.

2. Petitioner also contends (Pet. 9-12) that this Court's decision in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), requires a holding that the Federal Power Act creates an implied[12] antitrust exemption for the price squeeze at issue in this case.[13] The court of appeals correctly rejected this argument.

The strict standards that govern judicial determination of implied antitrust immunity based on subse-

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ence to *Noerr* appears in a portion of Justice Stevens' opinion not concurred in by a majority of the Court (428 U.S. at 601-602) and because the *Cantor* decision did not turn on *Noerr-Pennington*. We believe relience on *Cantor* was appropriate. No member of the Court expressed the view that the conduct at issue in *Cantor* was immunized by *Noerr*. Moreover, if a majority in *Cantor* had concluded that *Noerr* conferred immunity, there would have been no need to remand the case.

[12] The Federal Power Act contains no express antitrust exemption applicable to the conduct at issue in this case. In contrast, the Interstate Commerce Act, for example, provides an express and limited antitrust exemption for collective ratemaking agreements approved by the ICC. 49 U.S.C. (Supp. IV) 10706(a)(2)(A).

[13] Petitioner concedes (Pet. 9) that federal and state regulation of electric utilities has been held by this Court not to create any general exemption or immunity from the federal antitrust laws. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976).

quent regulatory statutes have been articulated by this Court in a long line of cases and "are well established." *National Gerimedical Hospital and Gerontology Center* v. *Blue Cross*, 452 U.S. 378, 388 (1981) (*National Gerimedical*). Exemptions from the antitrust laws are not favored; such exemptions " 'can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.' " *National Gerimedical, supra,* 452 U.S. at 388, quoting *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 719-720 (1975); see also *Gordon* v. *New York Stock Exchange, Inc., supra,* 422 U.S. at 682; *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-351 (1963); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 372 (1973). Even then, repeal of the antitrust laws is implied narrowly, only to the minimum extent necessary to make the regulatory scheme work —so as to effectuate the fundamental principles of the antitrust laws to the maximum extent consistent with the regulatory scheme. *National Gerimedical, supra*; *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357-359 (1963).

It follows that no implied exemption should be found in this case because, contrary to petitioner's contention, there is no "clear repugnancy" between the Federal Power Act and the application of the Sherman Act to the conduct at issue. There is no indication in the language or legislative history of the Federal Power Act that it was intended to authorize a price squeeze. Nor is there any inherent inconsistency between the requirement of the Federal Power Act that rates be "just and reasonable" and the application of Section 2 of the Sherman Act to price

squeezes.[14] Thus, as in *Otter Tail*,[15] the conduct at issue here remains subject to the Sherman Act.

The situation is entirely different from that which led this Court to find implied immunity in *Gordon*. There, the implied exemption for the conduct at issue—the fixing of rates for brokerage commissions—was based on actual conflict between the antitrust laws and the applicable regulatory statute. The Court found that the securities laws were intended to authorize, subject to regulatory supervision, the fixing of brokerage commission rates, which otherwise would have constituted price fixing—a per se violation of the Sherman Act. It was Congress' authorization of the conduct at issue,[16] and not the mere

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[14] The possibility that conflict might arise in the future (if, for example, a price squeeze were proved and if the district court then ordered UE to remedy the price squeeze by lowering its wholesale rates to a level deemed unreasonably low by FERC) does not warrant a grant of immunity in the absence of any actual conflict. *Otter Tail, supra*, 410 U.S. at 376.

[15] Petitioner seeks to distinguish this case from *Otter Tail* and *Cantor* (a case that involved the state action exemption, see pages 12-13, *infra*) on the ground that (Pet. 9-10) "[t]he alleged violations of the antitrust laws in those cases involved various activities other than the filed electric rates" while in this case "the alleged violation is based *solely* on the economic effect of [UE's] rates * * *" (emphasis in original). This distinction, however, does not affect the basic principle applicable to this case: antitrust immunity will not be implied in the absence of actual conflict with a federal regulatory statute.

[16] Congress, of course, may authorize private conduct that otherwise would violate the antitrust laws. Under the Supremacy Clause (Article 6, Clause 2), however, states cannot override federal antitrust law. Therefore, the implied repeal doctrine does not apply to state legislation. This is to be distinguished from the state action doctrine, which recognizes

existence of federal regulatory authority to review conduct under a standard different from that of the Sherman Act, that led to a determination that the restraints at issue were immune from antitrust liability.[17]

Petitioner also is incorrect in contending (Pet. 13-14) that *FPC* v. *Conway Corp.*, 426 U.S. 721 (1976), precludes application of the Sherman Act to the alleged price squeeze. This Court held in *Conway* that the FPC has jurisdiction to consider the relationship between jurisdictional (wholesale) and nonjurisdictional (retail) rates in determining whether jurisdictional rates are just, reasonable and nondiscriminatory. *Conway* did not hold that the FPC's jurisdiction to consider price squeeze allegations was exclusive, and there is no indication that Congress intended to give FERC sole jurisdiction to consider and remedy

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that Congress did not intend the Sherman Act to prohibit restraints that are fairly attributable to state decisions to replace competition with state supervision and control rather than private conduct. *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943). Where conduct is fairly attributable to private parties it is subject to the Sherman Act even if approved by a state. *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 n.45 (1978); *Cantor* v. *Detroit Edison Co.*, *supra*; *Parker* v. *Brown*, *supra*, 317 U.S. at 351.

[17] Thus, the fact that an agency must consider the competitive effects of action subject to its jurisdiction before approving it as consistent with the public interest as defined by the regulatory statute does not justify an implied antitrust immunity. See, e.g., *United States* v. *RCA*, 358 U.S. 334 (1959) (FCC approval of exchange of broadcast licenses does not confer antitrust immunity); *California* v. *FPC*, 369 U.S. 482 (1962) (FPC approval of acquisition does not confer antitrust immunity).

alleged price squeezes.[18] Application of the antitrust laws to alleged price squeezes would not frustrate FERC's regulation of wholesale rates. On the contrary, the availability of antitrust relief provides a necessary complement to FERC's limited power to remedy a price squeeze. All that FERC can do prospectively is to adjust the wholesale rate within the zone of reasonableness.[19] See *FPC* v. *Conway Corp., supra,* 426 U.S. at 278. If this is inadequate to remedy a price squeeze, FERC cannot compel a utility to file higher retail rates.[20]

3. Petitioner's final argument for antitrust immunity is that the conduct at issue falls within the state action exemption of *Parker* v. *Brown,* 317 U.S. 341 (1943). The conduct alleged to violate the antitrust laws in this case, however, does not constitute "state action" as that doctrine has been articulated by this Court. Rather, what is at issue is an essentially private restraint that is fully subject to the antitrust laws.

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[18] Nor can FERC award damages for the effects of unreasonable or discriminatory rates. *City of Mishawaka* v. *Indiana & Michigan Electric Co.,* 560 F.2d 1314, 1325 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978); see also *CF Industries, Inc.* v. *Transcontinental Gas Pipe Line Corp.,* 614 F.2d 33, 35-36 (4th Cir. 1980); *State of Louisiana* v. *FPC,* 503 F.2d 844, 867-868 (5th Cir. 1974).

[19] With respect to past harm, FERC can award refunds only in cases where it has suspended the rate; it cannot otherwise provide retroactive relief. *City of Batavia* v. *FERC,* 672 F.2d 64, 89 (D.C. Cir. 1982).

[20] Under the doctrine of primary jurisdiction the antitrust court may refer to FERC any issues calling for the agency's expertise. *Far East Conference* v. *United States,* 342 U.S. 570, 574-575 (1952); *City of Mishawaka* v. *Indiana & Michigan Electric Co., supra,* 560 F.2d at 1322.

This Court held in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), that "anticompetitive activities must be *compelled* by direction of the State acting as a sovereign" in order for private defendants to claim state action immunity for their conduct. 421 U.S. at 791 (emphasis added). This holding was reaffirmed in *Cantor* v. *Detroit Edison Co., supra*, 428 U.S. at 592-598.[21] Nothing in the Court's subsequent state action decisions involving state agencies and instrumentalities[22] has altered this compulsion standard for assessing private conduct. Neither the price squeeze at issue in this case nor UE's retail rates themselves are compelled by the state of Missouri. Therefore, under this Court's prior holdings, the state action defense is not available to UE.

In addition, even if the state action criteria applicable to governmentally imposed restraints (rather than the compulsion test) were applied to UE's alleged price squeeze, it still would be subject to the antitrust laws under the standard of *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc., supra*, 445 U.S. at 105. As the court of appeals correctly found (Pet. App. A-13), there is no clearly articulated state policy in favor of the alleged price squeeze, and the relationship between UE's wholesale and retail rates cannot be "actively supervised" by the state of Missouri since it has no authority over UE's wholesale rates.

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[21] See also 428 U.S. at 600 (plurality opinion); 428 U.S. at 604 (Burger, C.J., concurring); 428 U.S. at 609 (Blackmun, J., concurring); 428 U.S. at 623-626 (Stewart, J., dissenting) (all indicating approval of *Goldfarb* compulsion test).

[22] *City of Lafayette* v. *Louisiana Power & Light Co., supra*; *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc., supra*; *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.[23]

Respectfully submitted.

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DECEMBER 1982

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[23] The other issue presented in the petition—whether electricity is a "commodity" within the meaning of the Robinson-Patman Act—does not warrant review by this Court at this stage of the litigation. Petitioner has failed to show that the Eighth Circuit's holding on this issue is in conflict with that of any other court of appeals. At most, it has shown a conflict with two district court decisions (Pet. 16-17). Nor is the issue of sufficiently great importance to require decision by this Court in the absence of conflict; it has arisen only rarely in reported decisions of the lower courts. See Pet. 16-17; Br. in Opp. 17-19.

Moreover, the question whether electricity is a "commodity" may not dispose of petitioner's Robinson-Patman Act claim. The district court also held that claim defective for failure to allege that the challenged sales took place in interstate commerce. As the court of appeals noted (Pet. App. A-15): "Kirkwood asked for leave to amend its complaint to correct the supposed deficiency, but the District Court never ruled on the request." Thus, any review of this issue should await final determination of the Robinson-Patman Act claim by the lower courts.

APPENDIX B

Questions to be Answered by the Jury and its Answers (Pet. App. 156a-160a)

Questions To Be Answered By The Jury

Claim 1—Monopolization

1. Did defendants possess monopoly power in a relevant market?	Yes (Yes or No)
2. If so, did defendants wilfully maintain such monopoly power by predatory or anti-competitive conduct?	Yes (Yes or No)
3. If so, was such wilful maintenance of monopoly power a proximate cause of injury to plaintiffs?	Yes (Yes or No)

Claim 2—Attempted monopolization

4. Did defendants have a specific intent to obtain monopoly power in a relevant market?	Yes (Yes or No)
5. If so, did defendants attempt to obtain such monopoly power by anti-competitive or predatory conduct?	Yes (Yes or No)
6. If so, was there a dangerous probability that defendants would succeed in obtaining such monopoly power?	Yes (Yes or No)
7. If so, was such attempt a proximate cause of injury to plaintiffs?	Yes (Yes or No)

Claim 3—Conspiracy to monopolize

8. Did AT&T and one or more of the Bell companies, acting as separate entities, conspire or agree to monopolize a relevant market?	No (Yes or No)
9. If so, did these companies have the specific intent to maintain monopoly power in the relevant market?	No (Yes or No)
10. If so, did any of the conspirators commit any overt acts in furtherance of the conspiracy?	No (Yes or No)

11. If so, was the conspiracy a proximate cause of injury to plaintiffs? — No (Yes or No)

Claim 4—Conspiracy in restraint of trade

12. Did AT&T and one or more of the Bell companies, acting as separate entities, conspire or agree to engage in conduct which unreasonably restrained trade? — No (Yes or No)

13. If so, was any such conduct a proximate cause of injury to plaintiffs? — No (Yes or No)

14. What amount of money will fairly and reasonably compensate plaintiffs for the injuries they sustained to their telephone terminal equipment business as a proximate result of the violation or violations which you have found? — $91,900,000

15. If you have found under any one or more of the four claims that the interface device requirement was a violation of the antitrust laws, what amount of money will fairly and reasonably compensate plaintiffs for the injuries they sustained by having to pay for the installation and monthly rentals of defendants' interface devices, as a proximate result of such violation? — $ 268,243

Explanation of Answers to Questions 2 and/or 5
(Not required if you answered "No" to *both* questions)

16. If your answer to either Question 2 or Question 5 is "Yes," on which of the following alleged practices of defendants have you based your finding of predatory or anticompetitive conduct:

    a. Filing of the interface device tariff in bad faith? — Yes (Yes or No)

b. Intentional delay in providing and installing interface devices?	Yes (Yes or No)
c. Opposing certification in bad faith?	Yes (Yes or No)
d. Intentionally providing unduly expensive, inefficient or unreliable interface devices?	No (Yes or No)
e. Intentional pricing of PBX and key telephone services below incremental costs?	No (Yes or No)
f. Discriminating against purchasers of competitive terminal equipment in the price of network service?	No (Yes or No)
g. Misuse of information obtained through supplying of the interface devices to attempt to cause customers who have indicated their intention to purchase competitive equipment to lease Bell equipment instead?	No (Yes or No)
h. Bad faith refusal to sell inside wiring at all or on a reasonable basis?	Yes (Yes or No)
i. Bad faith delay in making cutovers?	Yes (Yes or No)

APPENDIX C

***Hush-A-Phone Corp.* v. *AT&T*, 22 F.C.C. 112 (1957)**

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D. C.

In the Matter of

HUSH-A-PHONE CORP. and HARRY C. TUTTLE, COMPLAINANTS *v.* AMERICAN TELEPHONE & TELEGRAPH CO., ET AL., DEFENDANTS	Docket No. 9189

APPEARANCES

Louis G. Caldwell, *Kelley E. Griffith*, *Max E. Wildman*, and *William H. Symmes, Jr.*, on behalf of the complainants; *Frank A. Fritz*, *T. Brook Price*, and *Edmund S. Hawley*, on behalf of the defendants; *Walter R. McDonald*, and *Austin L. Roberts, Jr.*, on behalf of the National Association of Railroad and Utilities Commissioners; *Norman S. Case*, on behalf of the United States Independent Telephone Association; and *Bernard Strassburg*, *William G. Butts*, and *Willis S. Ryza*, on behalf of the Federal Communications Commission.

DECISION AND ORDER ON REMAND

(Adopted: February 6, 1957)

BY THE COMMISSION: COMMISSIONER DOERFER abstaining from voting.

1. On November 8, 1956, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *Hush-A-Phone Corp.* v. *U. S.*, 238 F. 2d 266, in which it set aside the Commission's decision and order of December 21, 1955, herein, dismissing the complaint of Hush-A-Phone Corp. against defendants American Telephone & Telegraph Co. and the associated Bell System companies. The court remanded the case to the Commission for further proceedings not inconsistent with its decision.

2. The complaint of the Hush-A-Phone Corp., among other things, attacked the justness and reasonableness and, therefore, the lawfulness, under section 201 (b) of the Communications Act of 1934, as amended, of defendants' so-called "foreign attachment" tariff regulations [1] insofar as they barred the use by defendants' subscribers of

[1] One form of such tariff regulation, filed by two of the defendants, the Bell Telephone Company of Pennsylvania and the Diamond State Telephone Co., reads as follows:

"Equipment, apparatus and lines furnished by the Telephone Company shall be carefully used and no equipment, apparatus or lines not furnished by the Telephone Company shall be attached to, or used in connection therewith, unless specifically authorized in this tariff. When equipment, apparatus or lines furnished by the customer or subscriber are used in connection with equipment, apparatus or lines furnished by the Telephone Company,

the Hush-A-Phone device in connection with interstate and foreign telephone service. In dismissing the complaint, the Commission found, among other things, that the use of the Hush-A-Phone device affords some measure of privacy as well as a more quiet telephone wire by reason of exclusion of surrounding noise; that no physical damage of any consequence results to defendants' facilities when the Hush-A-Phone is used; but that the use of the Hush-A-Phone for the primary purpose for which it was designed, to wit, privacy, is accompanied by an impairment in the quality of telephone transmission; and that the unrestricted use of the Hush-A-Phone could result in a general deterioration of the quality of interstate and foreign service. Accordingly, the Commission concluded that it was not an unjust and unreasonable practice upon the part of the defendants to prohibit the use of the Hush-A-Phone device in connection with their telephone service.

3. In setting aside the Commission's order dismissing the complaint of Hush-A-Phone and remanding the case to the Commission, the Court of Appeals held that defendants' tariffs, under the Commission's decision are in unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental. The court points out that the Commission's conclusions of systemic or public injury resulting from the use of a Hush-A-Phone are not warranted where the only effect of such use is a diminution of volume and clarity of the Hush-A-Phone user's voice as heard by the party to whom he is speaking. It further points out that the user may obtain privacy of conversation by cupping his hand around the transmitter with similar diminution of volume and clarity.

4. In addition to invalidating the defendants' foreign attachment tariff regulations insofar as they bar the use of the Hush-A-Phone device, an inescapable consequence of the Court's opinion is to render such tariff regulations unjust and unreasonable insofar as they may be construed or applied to bar a customer from using other devices which serve the customer's convenience in his use of the facilities furnished by the defendants and which do not injure the telephone companies' employees or facilities, or the public in the use of defendants' services, or impair the operation of the telephone system. As we construe the Court's opinion, a tariff regulation which amounts to a blanket prohibition upon the customer's use of any and all devices without discriminating between the harmful and harmless encroaches upon the right of the user to make reasonable use of the facilities furnished by the defendants. Such a regulation goes beyond what is reasonably

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the equipment, apparatus and lines furnished by the customer or subscriber must be connected solely with the Telephone Company's system. Any equipment furnished by the Telephone Company shall remain the property of the Telephone Company and upon termination of service for any cause whatsoever be returned to it, in good condition, reasonable wear and tear thereof excepted."

Another form of tariff regulation, filed by the remaining defendants (other than the American Telephone & Telegraph Co.), provides:

"No equipment, apparatus, circuit or device not furnished by the Telephone Company shall be attached to or connected with the facilities furnished by the Telephone Company, whether physically, by induction or otherwise, except as provided in this tariff. In case any such unauthorized attachment or connection is made, the Telephone Company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service."

required in the interest of protecting the defendants' employees, facilities, the telephone system and the public from adverse effects. Accordingly, we conclude that the tariff regulation is unjust and unreasonable and, therefore, unlawful to the extent we have indicated.

5. *It is ordered*, That defendants herein shall file tariff schedules, effective no later than April 1, 1957, on not less than 30 days notice to the Commission and the public, rescinding and canceling any tariff regulations to the extent that they prohibit a customer from using, in connection with interstate or foreign telephone service, the Hush-A-Phone device or any other device which does not injure defendants' employees, facilities, the public in its use of defendants' services, or impair the operation of the telephone system.

APPENDIX D

***In re Carterfone Device*, 13 F.C.C. 2d 420 (1968) (Appendix A and Appendix B, 13 F.C.C. 2d 427-29, omitted)**

FCC 68-661

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of USE OF THE CARTERFONE DEVICE IN MESSAGE TOLL TELEPHONE SERVICE	Docket No. 16942
In the Matter of THOMAS F. CARTER AND CARTER ELECTRONICS CORP., DALLAS, TEX. (COMPLAINANTS), *v.* AMERICAN TELEPHONE AND TELEGRAPH CO., ASSOCIATED BELL SYSTEM COMPANIES, SOUTHWESTERN BELL TELEPHONE CO., AND GENERAL TELEPHONE CO. OF THE SOUTHWEST (DEFENDANTS)	Docket No. 17073

APPEARANCES

Messrs. *Bill Brice* and *Ray G. Besing* (Geary, Brice & Lewis) on behalf of Thomas F. Carter and Carter Electronics Corp.; Messrs. *Reed Miller* and *David H. Lloyd* (Arnold & Porter), and Mr. *Hubert M. Preston* on behalf of General Telephone Co. of the Southwest; Messrs. *Theodore F. Brophy, Donal F. McCarthy, Reed Miller* and *David H. Lloyd* on behalf of G.T. & E. Service Corp.; Mr. *W. H. Borghesani, Jr.* (Keller and Heckman) on behalf of National Retail Merchants Association; Messrs. *Joseph E. Keller* and *W. H. Borghesani, Jr.* (Keller and Heckman) on behalf of Central Committee on Communication Facilities of the American Petroleum Institute; Messrs. *Wayne E. Babler, Melvin R. Quinlan, Harold J. Cohen* and *Raymond F. Scully* on behalf of Bell System Respondents; Mr. *Warren E. Baker* (Chadbourne, Parke, Whiteside & Wolff) on behalf of United States Independent Telephone Association; and Messrs. *John M. Lothschuetz* and *Paul W. Hammack* on behalf of Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

(Adopted June 26, 1968)

BY COMMISSIONER JOHNSON FOR THE COMMISSION: COMMISSIONER LOEVINGER DID NOT PARTICIPATE IN THE DECISION IN THIS CASE.

This proceeding involves the application of American Telephone and Telegraph Co. tariffs to the use by telephone subscribers of the Carterfone.

The Carterfone is designed to be connected to a two-way radio at the base station serving a mobile radio system. When callers on the radio and on the telephone are both in contact with the base station

operator, the handset of the operator's telephone is placed on a cradle in the Carterfone device. A voice control circuit in the Carterfone automatically switches on the radio transmitter when the telephone caller is speaking; when he stops speaking, the radio returns to a receiving condition. A separate speaker is attached to the Carterfone to allow the base station operator to monitor the conversation, adjust the voice volume, and hang up his telephone when the conversation has ended.

The Carterfone device, invented by Thomas F. Carter, has been produced and marketed by the Carter Electronics Corp., of which Mr. Carter is president, since 1959. From 1959 through 1966 approximately 4,500 Carterfones were produced and 3,500 sold to dealers and distributors throughout the United States and in foreign countries.

The defendant telephone companies, acting in accordance with their interpretation of tariff FCC No. 132, filed April 16, 1957,* by American Telephone and Telegraph Co., advised their subscribers that the Carterfone, when used in conjunction with the subscriber's telephone, is a prohibited interconnecting device, the use of which would subject the user to the penalties provided in the tariff. The tariff provides that:

> No equipment, apparatus, circuit or device not furnished by the telephone company shall be attached to or connected with the facilities furnished by the telephone company, whether physically, by induction or otherwise. * * * (A fuller text is provided in appendix A.)

A private antitrust action was brought by Carter against American Telephone and Telegraph Co. and General Telephone Co. of the Southwest. The District court held that because of its "special competence and 'expertise'" in the technical and complex matter of telephone communication, the Federal Communications Commission, under the doctrine of primary jurisdiction, is vested with the right to determine the "justness, reasonableness, validity, application, and effect of the tariff and practices here involved." *Carter* v. *AT&T*, 250 F. Supp. 188, 192 (N.D. Texas, 1966). The court reserved jurisdiction to pass ultimately upon the antitrust issues after proceedings before the Commission should be concluded. The United States Court of Appeals for the Fifth Circuit affirmed the District court's decision on August 17, 1966. *Carter* v. *American Telephone and Telegraph Co.* 365 F. 2d 486 (5th Cir., 1966). On October 20, 1966, the Commission on its own motion ordered that a public hearing be held to resolve "the question of the justness, reasonableness, validity, and effect of the tariff regulations and practices complained of," assigning docket No. 16942. The following five specific issues were designated for hearing:

> 1. The nature and extent of the public need and demand for the use of the Carterfone device in connection with interstate or foreign message toll telephone service;
>
> 2. The effect of the use of the Carterfone device upon the operation of the telephone system used to provide interstate and foreign telephone message toll telephone services to the public or upon the employees and facilities

*This tariff is now superseded by tariff FCC No. 263.

of the telephone companies providing such services or upon the public in its use of such telephone system;

3. Whether the provisions of tariff FCC No. 132 filed by American Telephone and Telegraph Co. may properly be construed to prohibit any telephone user from attaching the Carterfone device to the facilities of the telephone companies for use in connection with interstate and foreign message toll telephone services;

4. If the aforesaid tariff provisions may properly be construed to prohibit telephone users from attaching the Carterfone device to the facilities of the telephone companies for use in connection with interstate or foreign message toll telephone services;

(*a*) Whether such regulations are, or will be, unjust and unreasonable and, therefore, unlawful within the meaning of section 201(b) of the Communications Act of 1934, as amended, or are, or will be unduly discriminatory or preferential in violation of section 202(a) of said Act;[1]

(*b*) Whether, in the light of facts developed in connection with the foregoing issues, the Commission, in accordance with the provisions of section 205 of the Act, should prescribe tariff regulations which will permit the use of the Carterfone device in connection with interstate and foreign toll telephone service and, if so, the kind of tariff regulations which should be prescribed;

5. If the aforesaid tariff regulations of the telephone companies may not properly be construed to prohibit telephone users from attaching the Carterfone device to the facilities of the telephone companies for use in connection with interstate or foreign message toll telephone services, what action, if any, should be taken by the Commission with respect thereto.

Thomas F. Carter and Carter Electronics Corporation (hereafter Carter), American Telephone and Telegraph Co. and 22 associated Bell System companies (A.T. & T.), and General Telephone Co. of the Southwest (General) were named parties respondent. Subsequently, several parties were allowed to intervene. The United States Independent Telephone Association and G.T. & E. Service Corp. intervened on the side of A.T. & T. and General, and the Central Committee on Communications Facilities of the American Petroleum Institute, and the Retail Research Institute of the National Retail Merchants Association intervened on the side of Carter.

On December 21, 1966, Carter filed a formal complaint pursuant to section 208 of the Communications Act, 47 U.S.C. § 208, against General and certain of the Bell companies, and further proceedings in docket No. 16942 were held in abeyance pending disposition of the complaint (docket No. 17073). By order released March 8, 1967, the complaint was consolidated for hearing with docket No. 16942, and the following issues were added:

1. Whether, with respect to the period from February 6, 1957, to December 21, 1966, the regulations and practices in tariff FCC No. 132 of the American Telephone and Telegraph Co. were properly construed and applied to prohibit any telephone user from attaching the Carterfone device to the facilities of the telephone companies for use in connection with interstate and foreign message toll telephone service; and if so

[1] Sec. 201(b) provides: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: * * *"

Sec. 202(a) provides: "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

2. Whether, during the aforesaid period, such regulations and practices were unjust and unreasonable, and therefore unlawful within the meaning of section 201(b) of the Communications Act of 1934, as amended, or were unduly discriminatory or preferential in violation of section 202(a) of said Act.

The examiner found that there was a need and demand for a device to connect the telephone landline system with mobile radio systems which could be met in part by the Carterfone. He also found that the Carterfone had no material adverse effect upon use of the telephone system. He construed the tariff to prohibit attachment of the Carterfone whether or not it harmed the telephone system, and determined that future prohibition of its use would be unjust and unreasonable. He also found that it would be unduly discriminatory under section 202(a) of the Act, since the telephone companies permit the use of their own interconnecting devices. However, he did not find the tariff prohibitions to have been unlawful in the past, largely because the harmless nature of the Carterfone was not known to the telephone companies, and he did not find that a general prohibition against non-telephone company supplied interconnecting devices was unjust or unwise, because of the risk he saw of "serious harm to the heart of the nation's communications network."

We agree with and adopt the examiner's findings that the Carterfone fills a needs and that it does not adversely affect the telephone system. They are fully supported by the record. We also agree that the tariff broadly prohibits the use of interconnection devices, including the Carterfone. Its provisions are clear as to this. Finally, in view of the above findings, we hold, as did the examiner, that application of the tariff to bar the Carterfone in the future would be unreasonable and unduly discriminatory. However, for the reasons to be given, we also conclude that the tariff has been unreasonable, discriminatory, and unlawful in the past, and that the provisions prohibiting the use of customer-provided interconnecting devices should accordingly be striken.

We hold that the tariff is unreasonable in that it prohibits the use of interconnecting devices which do not adversely affect the telephone system. See *Hush-A-Phone Corp.* v. *U.S.*, 99 U.S. App. D.C. 190, 193, 238 F. 2d 266, 269 (D.C. Cir., 1956), holding that a tariff prohibition of a customer supplied "foreign attachment" was "in unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."[2] The principle of Hush-A-Phone is directly applicable here, there being no material distinction between a foreign attachment such as the Hush-A-Phone and an interconnection device

[2] After Hush-A-Phone, the Commission directed A.T. & T. to "file tariff schedules * * * rescinding and cancelling any tariff regulations to the extent that they prohibit a customer from using, in connection with interstate, or foreign telephone service, the Hush-A-Phone device or any other device which does not injure defendants' employees, facilities, the public in its use of defendants' services or impair the operation of the telephone system." Hush-A-Phone, decision and order on remand, 22 F.C.C. 112 (Feb. 6, 1957). The Commission additionally stated in its decision and order on remand: "As we construe the court's opinion, a tariff regulation which amounts to a blanket prohibition upon the customer's use of any and all devices without discriminating between the harmful and harmless encroaches upon the right of the user to make reasonable use of the facilities furnished by the defendants." The modification of the offending tariff provision filed by A.T. & T., and designated paragraph B24 of tariff FCC No. 132, is at issue here.

such as the Carterfone, so far as the present problem is concerned.[3] Even if not compelled by the Hush-A-Phone decision, our conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others. A tariff which prevents this is unreasonable; it is also unduly discriminatory when, as here, the telephone company's own interconnecting equipment is approved for use. The vice of the present tariff, here as in Hush-A-Phone, is that it prohibits the use of harmless as well as harmful devices.

A.T. & T. has urged that since the telephone companies have the responsibility to establish, operate and improve the telephone system, they must have absolute control over the quality, installation, and maintenance of all parts of the system in order effectively to carry out that responsibility. Installation of unauthorized equipment, according to the telephone companies, would have at least two negative results. First, it would divide the responsibility for assuring that each part of the system is able to function effectively and, second, it would retard development of the system since the independent equipment supplier would tend to resist changes which would render his equipment obsolete.

There has been no adequate showing that nonharmful interconnection must be prohibited in order to permit the telephone company to carry out its system responsibilities. The risk feared by the examiner has not been demonstrated to be substantial, and no reason presents itself why it should be. No one entity need provide all interconnection equipment for our telephone system any more than a single source is needed to supply the parts for a space probe. We are not holding that the telephone companies may not prevent the use of devices which actually cause harm, or that they may not set up reasonable standards to be met by interconnection devices. These remedies are appropriate; we believe they are also adequate to fully protect the system.

Nor can we assume that the telephone companies would be hindered in improving telephone service by any tendency of the manufacturers and users of interconnection devices to resist change. The telephone companies would remain free to make improvements to the telephone system and could reflect any such improvements in reasonable revised standards for nontelephone company provided devices used in connection with the system. Manufacturers and sellers of such devices would then have the responsibility of offering for sale or use only such equipment as would be in compliance with such revised standards. An owner or user of a device which failed to meet reasonable revised standards for such devices, would either have to have the device rebuilt to comply with the revised standards or discontinue its use. Such is the risk inherent in the private ownership of any equipment to be used in connection with the telephone system.

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[3] The Hush-A-Phone was a cup-like device mechanically fastened to the mouthpiece of a telephone handset. The Carterfone by means of acoustic and inductive coupling effectively achieves an "interconnection" between the public toll telephone system and private mobile radio systems. These differences are immaterial, however, insofar as the Hush-A-Phone holding is concerned.

The present unlawfulness of the tariff also permeates its past. It has been unreasonable and unreasonably discriminatory since its inception, for the reasons given above. That the telephone companies may not have known prior to the proceedings herein that the Carterfone was in fact harmless is irrelevant, since they barred its use without regard to its effect upon the telephone system. Furthermore, the tariff was the carrier's own. It was not prescribed by the Commission. It has remained subject to complaint and to a finding that it had been unlawful since its inception.

A Commission-prescribed rate or practice must be followed by the carrier. It becomes the lawful rate or practice. But where the carrier itself initiates the rate or practice its lawfulness remains open, not only to a prospective finding but also to a retroactive one. *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932). And it is not a bar to such a finding of past unlawfulness that the tariff has been permitted to remain in effect and has not, until now been the subject of a determination as to its lawfulness.[4] See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943), finding no agency prescription even where the agency had stated that a rate was "shown to be just and reasonable"; *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 571–572 (1947); *Public Utilities Commission of California* v. *United States*, 356 F. 2d 236 (9th Cir., 1966). As was said in *Birmingham Slag Co.* v. *United States*, 11 F. Supp. 486, 487 (N.D. Ala., 1935):

> Our conclusion is that [the Commission] • • • without adjudging their individual reasonableness, merely authorized the carriers to put in the general level of rates, at their risk, if they were so advised, and remove certain incidental obstructions to the carriers doing so, which were presented by section 13(4) of the act (49 USCA § 13(4)), and agreed not to make a suspensory order, in advance of hearing, under complaints filed under section 13. • • • We think the rates in controversy were carrier, and not Commission-made rates. Their validity has not been declared, nor has the Commission ordered them put in effect. They stand just as if filed by the carrier with the Commission, with no action on the part of the Commission making their validity a matter of adjudication against the shippers, and the shippers' right to a day in court is not impaired, either as to the invalidity of the rate, or the right to reparations.

See also *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va., 1935).

In view of the unlawfulness of the tariff there would be no point in merely declaring it invalid as applied to the Carterfone and permitting it to continue in operation as to other interconnection devices. This would also put a clearly improper burden upon the manufacturers and users of other devices. The appropriate remedy is to strike the tariff and permit the carriers, if they so desire, to propose new tariff provisions in accordance with this opinion. We make no rulings as to

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[4] On May 16, 1957, the Commission issued a public notice stating that the Commission had "elected to permit" the revised tariff submitted by the telephone companies to go into effect. The prohibitions as to interconnection devices were mentioned in the public notice. Thereafter, the Commission on various occasions cited the prohibitions in response to inquiries about attachments or interconnecting devices, without questioning the validity of the prohibitions. The Examiner's finding that the tariff provisions in question were valid prior to the instant hearing appears to have been based in part on this history. However, none of this made the tariff one prescribed by the Commission.

damages since that relief has not been requested.[5] As noted above, the carriers may submit new tariffs which will protect the telephone system against harmful devices, and may specify technical standards if they wish.

Accordingly, we find that tariff FCC No. 263, paragraphs 2.6.1 and 2.6.9 are, and have since their inception been, unreasonable, unlawful and unreasonably discriminatory under sections 201(b) and 202(a) of the Communications Act of 1934, as amended.

Other ancillary matters require our attention and disposition. On March 27, 1968, the Chief, Common Carrier Bureau, requested that the Commission take official notice of a new Canadian statute, entitled "An Act Respecting the Bell Telephone Company of Canada," which became effective on March 7, 1968. The statute has some relevance to this proceeding because it states the national policy with respect to foreign attachments of a neighboring country whose telephone system is completely interconnected with the telephone system of the United States. Accordingly, the Common Carrier Bureau's request for official notice will be granted.

On March 18, 1968, the Commission received a petition to accept an amicus curiae brief, together with the brief, from Prof. Willis Rokes of the Municipal University of Omaha, Omaha, Nebr. In general, Professor Rokes supports the position advanced by Carter and the Common Carrier Bureau. The Commission appreciates obtaining the carefully considered views of interested members of the public in matters of great public concern such as we have here. Accordingly, the petition will be granted and the brief amicus curiae accepted.

On May 3, 1968, motions to correct the transcript of oral argument were filed by the Bell System Parties, the United States Independent Telephone Association, the General Telephone Co. of the Southwest, G. T. & E. Service Corporation, the Chief, Common Carrier Bureau, and the United States Department of Justice. No oppositions were filed to any of these requests, and they will be granted.

It is ordered, that the "Request for Official Notice," filed March 27, 1968, by Chief, Common Carrier Bureau, *Is granted;*

It is further ordered, that the petition to accept an amicus curiae brief filed on March 18, 1968, by Prof. Willis Rokes *Is granted*, and that the said brief *Is accepted;*

It is further ordered, that the motions to correct transcript of oral argument filed on May 3, 1968, by the Bell System Parties, the United States Independent Telephone Association, the General Telephone Co. of the Southwest, G. T. & E. Service Corp., the Chief, Common Carrier Bureau, and the United States Department of Justice, *Are granted;*

It is further ordered, that paragraphs 2.6.1 and 2.69 of tariff F.C.C. No. 263 be stricken and not thereafter be published or given any effect;

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[5] We do not intend to determine any issues which may arise in the pending litigation, *e.g.*, a claim that the Carterfone may have been harmful as manufactured at some time in the past.

It is further ordered, that this proceeding *Is terminated;* and

It is further ordered, that this Order shall be effective July 29, 1968.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX E

***In re Carterfone Device*, 14 F.C.C. 2d 571 (1968)**
(on reconsideration)

FCC 68-922

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of USE OF THE CARTERFONE DEVICE IN MESSAGE TOLL TELEPHONE SERVICE	Docket No. 16942
In the matter of THOMAS F. CARTER AND CARTER ELECTRONICS CORP., DALLAS, TEX., COMPLAINANTS v. AMERICAN TELEPHONE & TELEGRAPH CO., ASSOCIATED BELL SYSTEM CO., SOUTHWESTERN BELL TELEPHONE CO., AND GENERAL TELEPHONE CO. OF THE SOUTHWEST, DEFENDANTS	Docket No. 17073

MEMORANDUM OPINION AND ORDER

(Adopted September 11, 1968)

BY THE COMMISSION:

1. The Commission has before it petitions for reconsideration of our *Decision* herein released June 27, 1968 (13 FCC 2d 420), filed by American Telephone & Telegraph Co. and Bell Telephone System Associated Cos. (hereafter A.T. & T.); General Telephone Co. of the Southwest and G.T. & E. Service Corp. (General); U.S. Independent Telephone Association; National Association of Regulatory Utility Commissioners (NARUC); Tennessee Public Service Commission; South Carolina Public Service Commission; Mississippi Public Service Commission; Georgia Public Service Commission and Arizona Corporation Commission.[1] Oppositions to reconsideration have been filed by the Chief, Common Carrier Bureau; Thomas F. Carter and Carter Electronics Corp. (Carter); the United States of America; the National Retail Merchants Association (NRMA) (in docket No. 16942); and the Central Committee on Communication Facilities of the American Petroleum Institute (API). Several replies to the oppositions have also been filed.

2. It may be helpful to recapitulate briefly our decision of June 27, 1968 before taking up the arguments made upon reconsideration. This

[1] These State regulatory bodies have not been parties to this proceeding, and the National Retail Merchants Association has moved to strike their petitions for failure to show good cause for late participation. Petitions for reconsideration were also submitted by the following nonparty commissions: Colorado Public Utilities Commission, July 31, 1968; Idaho Public Utilities Commission, Aug. 1, 1968; Public Service Commission of Kentucky, July 31, 1968; Montana Public Service Commission, Aug. 5, 1968; Public Service Commission of Wyoming, Aug. 19, 1968. The Western Union Telegraph Co. has also filed, on Sept. 3, 1968, a petition for limited intervention to comment in support of the telephone companies' position.

is a consolidated proceeding. Docket No. 16942 was instituted upon our own motion to determine the need for the Carterfone, a device used to interconnect mobile radio systems to the interstate and foreign message toll telephone system; the effect of use of the Carterfone upon telephone service; whether A.T. & T. Tariff FCC No. 132 (now No. 263) prohibited use of the Carterfone as an interconnection device and, if so, whether the tariff regulations are lawful. A further issue was to determine whether the Commission should itself prescribe tariff regulations which would permit the use of the Carterfone. Issues on the past effect and lawfulness of the tariff were added in docket No. 17073 upon the filing of a complaint by Carter.

3. We held that the Carterfone filled a need, that its use did not adversely affect the telephone system, that its use was nevertheless precluded by the tariff, and that the tariff was unlawful, and had been in the past, because it prohibited the use of the Carterfone and other interconnecting devices without regard to actual harm caused to the telephone system. We did not prescribe the terms of a new tariff, but left that to the initiative of the telephone companies, pointing out that they were in no wise precluded from adopting reasonable standards to prevent harmful interconnection. Basic to our holding was a rejection of A.T. & T.'s position that because A.T. & T. cannot control the interconnected private system, interconnection is by definition a degradation of the message toll telephone system without regard to the quality of the interconnecting device or of the interconnected mobile radio system, i.e., without regard to actual harmful effects. We viewed this position [2] and the rule embodying it as unreasonable. General has contended that the Commission has "opened the door to customer ownership of telephone handsets." The facts of this case did not involve the furnishing of purely telephone system equipment telephone-to-telephone on the message toll telephone system. Nor, of course, were we concerned with the interconnection of telephone companies. With this recapitulation, we can turn to the contentions presented for reconsideration.

4. The primary contention upon reconsideration is that our decision permits the use of a myriad of customer-provided devices for interconnection without adequate exploration of the technical and economic problems. This record convinces us that there can be interconnection without harmful technical effects. With respect to possible economic effects from the interconnection of private systems—"the piecing out of common carrier services with unregulated systems"—no substantial effort was made on this record to demonstrate any harm from the

[2] That this was A.T. & T.'s position is clear, *see*, e.g., Tr. 565–567, 570–571, 577–578, 607–621. We found no substantial factors outweighing the necessity of eliminating the arbitrary tariff. Standards to prevent the introduction of harmful inputs can be devised (Tr. 626–627; see also par. 2.6.9 of tariff No. 263 containing a general prohibition against harmful attachments, and tariff No. 260, par. 2.1.4(D)), and enforcing them would be no more difficult than enforcing the present absolute prohibition. Furthermore, notification to the carrier of the installation of a connecting device, which would be a reasonable requirement, would greatly relieve any problems of discovering the source of any harmful interconnection (Tr. 912). The record also showed that terminal devices may be used under a standard making actual harm a factor, and the distinction between terminal devices and interconnection appears to be solely one of function unrelated to inherent propensity for injurious effects (Tr. 666–696, 1033–1036).

interconnection of private mobile radio systems,[3] and we therefore had no occasion to address ourselves to that question. We agree that economic effects upon the carriers' rate structure might well be a public interest question. But it is an issue, if a carrier seeks to raise it, to be decided upon the facts, i.e., will there be a "cream skimming" effect, what will be the extent of it, and how does it weigh against the benefits of interconnection. As is the case with the question of technical harm, a tariff is unreasonable if it assumes *a priori* a conclusion as to such an issue. Thus, aside from the use of the Carterfone to interconnect private mobile systems—as to which we found no technical harm and any cream skimming (for existing systems certainly) had already taken place when such systems were authorized—our decision does not have the asserted effect of delineating any particular interconnections as permissible. What it does is to require tariffs reasonably addressed to the asserted problems.[4] Nothing else new of substance is presented on this question.

5. We also reject the related claim that the decision goes beyond the issues. To say, as some of the parties do, that the hearing related solely to the Carterfone[5] and not to the validity of the tariff's broad prohibition would make the hearing essentially meaningless. The issues plainly included consideration of the basic validity of the tariff if it was the total prohibitory effect of the tariff which rendered its application to the Carterfone unreasonable. As we pointed out in our June decision, such a fault in a tariff can only be remedied by its revision. It should be noted in this connection that it was well understood that this was an "interconnection" case, and A.T. & T. and General both argued on a broad base (e.g., A.T. & T. exhibit 1; Tr. 81–85; Brief to Examiner, pp. 36–37; General's Proposed Findings, p. 86) the need for a general prohibition against all interconnection not arranged by them.[6]

6. It is also urged that present unlawfulness of the tariff, assuming such unlawfulness to have been properly determined, does not justify a finding of past unlawfulness. But in this case the basis upon which the tariff was found to be presently unlawful is fully applicable to the past as well as the present. We recognize that an order for reparations and an order setting future rates are separate matters, and that a new prescription may be made without finding a past rate to have been unlawful, if there is a reason, as where an initially lawful rate has gradually become unreasonable with the passage of time. See *Baer Brothers* v. *Denver & R.G.R.R.*, 233 U.S. 479; *Ashland Coal & Ice Co.* v. *United*

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[3] While A.T. & T. adverted to this problem (A.T. & T. exhibit 1, pp. 15–16), it made no effort to demonstrate adverse economic effects, and we cannot go on speculation. *Allocation of Microwave Frequencies Above 890 Mc.*, 27 FCC 359, 411–413 (1959). The issues included substantiation of any such claimed economic injury. The further contention that the carriers and the public will be adversely affected by a loss of revenue from existing interconnection equipment is unsubstantiated and insubstantial.

[4] We also struck down the prohibition against direct electrical connection. A.T. & T. seems to regard this as a special category but is unable to define it consistently as including or excluding inductive couplings, compare Tr. 972–974 with petition for reconsideration, p. 5. If wire-to-wire connections present a special problem, the nature of that problem should be made clear in an explanation accompanying any new tariff. The term should also be precisely defined.

[5] The exclusion of evidence going beyond the Carterfone concerned the effect of a modification of the Carterfone, and the examiner properly ruled that other devices were not in issue. (Tr. 518–529.) This did not mean the tariff was not in issue.

[6] The clear issues and understanding of the parties cannot be changed by a statement in oral argument to the Commission (Tr. 1217) that general interconnection was not at issue.

States, 61 F. Supp. 708 (E. D. Va., 1945). But such cases have no application here where the invalidity obtained throughout the period in issue.[7] The decisive element, of course, is the reason why a tariff is found to be unlawful. If, as here, the reason applies as well to the past as to the present and future, there is no ground for disparate findings. We similarly adhere to our ruling that the tariff was carrier-initiated, and so remained open to a finding of past unlawfulness.[8] The Commission's decision on remand in *Hush-A-Phone*, 22 FCC 112 (1957) did not prescribe the terms of tariff revision, but left it to the carrier to formulate new provisions consonant with the Court's decision. It cannot now be contended by A.T. & T. that it construed the remand decision as a prescription by the Commission of a tariff prohibiting interconnection in view of A.T. & T.'s own statement in submitting a revised tariff that in their decisions "neither the Commission nor the Court dealt with the interconnection problem, which involves considerations different from those involved in the use of attachments." (A.T. & T. exhibit 3, attachment C, page 9.) Therefore, there was no Commission prescription of the interconnection prohibitions at that time, either in fact or as understood by A.T. & T. Furthermore, the decision to permit the filing of the revised tariff, and subsequent Commission references to it,[9] cannot be deemed prescription. The Commission's acceptance of the tariff for filing was not an adjudication of the tariff's validity and did not make it a Commission-prescribed tariff, and the tariff of course had to be complied with by telephone customers so long as it was on file, *Chicago, M., St. P. & P.R. Co.* v. *Alouette Peat Products*, 253 F. 2d 449 (C.A. 9, 1957). In sum, the Commission did not prescribe the tariff, and until now had made no ruling on its lawfulness.[10] The cases cited in our June decision are conclusive on this point.

7. A.T. & T. further contends that the tariff cannot be found to be in violation of section 202(a) of the act because that section prohibits discrimination among customers only. General agrees, but the Common Carrier Bureau does not. We find it unnecessary to resolve this question [11] and will not rely upon section 202(a).

8. Other arguments made in the various petitions have been considered but do not warrant further discussion. Finally, we must dismiss the State commission petitions for reconsideration. The NARUC was permitted an *amicus* participation upon a late intervention, and has presented the views of the State bodies. While some of the parties

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[7] Nor is *William N. Feinstein & Co.* v. *United States*, 209 F. Supp. 613 (S.D.N.Y., 1962), affirmed 317 F. 2d 509 (C.A. 2. 1963), relevant. There, a later decision finding no past unlawfulness was held to be valid even if apparently inconsistent with an earlier decision of the agency. It was pointed out, in addition, that there had been a shift in the burden of proof in the two proceedings (in the first case, the burden was on the proponent of certain charges to show their present lawfulness, while in the later case the burden was on the complainant to show past unlawfulness), as well as different evidence, which might have accounted for the apparently inconsistent results.

[8] We do not mean to suggest that if a question of damages were before us, we would award damages where a device was in fact harmful. See footnote 5 of our June *Decision*.

[9] We note in this connection that Chairman Henry's letter to Mr. Carter, relied upon because of its statement that the Commission was of the opinion that the tariff conformed to its *Order* (A.T. & T. exhibit 3, attachment L), was not a Commission action and, moreover, invited the filing of a complaint.

[10] As the Common Carrier Bureau points out, the Commission in 1962 refused to find the interconnection prohibitions to be lawful. *A.T. & T.* (*Railroad Interconnection*), 32 FCC 337, 340.

[11] This is so although the record contained evidence that the carrier in fact discriminated among customers in the application of the tariff.

now seeking intervention have filed within 30 days of the release of our decision, we cannot find good cause for such late participation in the contention that it was not known that the issues would "include consideration of the validity of tariffs restricting interconnection of customer-owned devices" (Georgia petition). (See sec. 1.106(b) of our rules, 47 CFR 1.106(b).) In light of what has been said above, this is an inadequate statement. The other State petitions are additionally untimely under section 405 of the Communications Act, 47 U.S.C. 405, not having been filed within 30 days of the release of our decision. The petition of the Western Union Telegraph Co. for leave to intervene on a limited basis to support A.T. & T.'s position will also be denied for failure to show good cause or need for such late participation.

9. *It is ordered*, That, except as specified above, the petitions for reconsideration filed by the parties hereto and by NARUC *Are denied;* and

10. *It is further ordered*, That the stay of our June 27, 1968 decision which was ordered on July 26, 1968 (FCC 68-774) *Is dissolved* effective November 1, 1968: and

11. *It is further ordered*, That the petitions for reconsideration or intervention filed by the State regulatory bodies referred to in paragraph 1 and footnote 1 above *Are dismissed;* and

12. *It is further ordered*, That the petition for limited intervention filed by the Western Union Telegraph Co. on September 3, 1968 *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX F

First Report and Order in Docket 19528, **56 F.C.C. 2d 593 (1975) (New Part 68 of the Commission's Rules and Regulations, 56 F.C.C. 2d 614-22, omitted)**

FCC 75-1248

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PROPOSALS FOR NEW OR REVISED CLASSES OF INTERSTATE AND FOREIGN MESSAGE TOLL TELEPHONE SERVICE (MTS) AND WIDE AREA TELEPHONE SERVICE (WATS)	Docket No. 19528

FIRST REPORT AND ORDER

(Adopted October 31, 1975; Released November 7, 1975)

BY THE COMMISSION: COMMISSIONER REID ABSENT; COMMISSIONERS HOOKS AND ROBINSON CONCURRING AND ISSUING STATEMENTS.

PRELIMINARY STATEMENT

1. The Commission has under consideration the Recommended First Report and Order of the Federal-State Joint Board (Joint Board) in this matter, together with its recommendation that we also consider the General Order establishing the California registration program. We also have before us the comments concerning these proposals which we requested interested persons to file in our Memorandum Opinion and Order released May 27, 1975 (53 FCC 2d 219).

2. Timely comments were filed by Ad Hoc Telecommunications Committee, Adcor Electronics, Inc., American Petroleum Institute, American Telephone and Telegraph Company (AT&T), Association of American Railroads, Association of Data Processing Service Organizations, California Public Utilities Commission, Communication Certification Laboratory, Computer and Business Equipment Manufacturer's Association, Continental Telephone Corporation, DASA Corporation, Dictaphone Corporation, Electronic Industries Association. Executone Communication Systems, The GTE Companies, Independent Data Communications Manufacturers Association, International Business Machines, National Telephone Cooperative Association, National Retail Merchant's Association, North American Telephone Association, North Carolina Utilities Commission. Office of Consumer Affairs by Virginia H. Knauer, Phonetele, Inc., Public Utilities Commission of Ohio, Rochester Telephone Company, Rollings Protective Service Company, Scott-Buttner Communications, Sentry Technology, Inc., T.A.D. Avanti, Inc., United States Department of Justice, United States Independent Telephone Association, and Utilities Telecommunications Council. In addition we have received approximately two hundred letters addressing this subject.

3. We also received Reply Comments filed by Phone Mate, Inc., an Opposition to the Reply Comments of Phone Mate, Inc. filed by

AT&T, a Petition for Leave to File Further Comments and Further Comments filed by the Ohio Public Utilities Commission, Motion for Acceptance of Late Filing and Comments of New York Public Service Commission, Supplemental Comments filed by the Computer and Business Equipment Manufacturer's Association, and Supplemental Comments filed by International Business Machines. While we only provided for the filing of comments in our Memorandum Opinion and Order, *supra*, and made no provision for the filing of any further comments, we believe the subject before us to be of such significance that we have accepted such late filed comments and further comments to assist us in determining our course of action.

4. GTE Service Corporation has filed a motion requesting that the Commission establish certain additional procedural dates or meetings for the purpose of obtaining comments on AT&T's Authorized Protective Connecting Module program. Continental Telephone Corporation filed Comments supporting this motion. AT&T has also filed a motion requesting us to institute further proceedings to explore the option of allowing connection of terminal equipment through discrete protective modules. In view of the action we are taking herein, we perceive no necessity for the procedures or meetings GTE Service Corporation and AT&T have requested, since in accordance with our Memorandum Opinion and Order released November 5, 1974, 49 FCC 2d 580, we have considered AT&T's Authorized Protective Connecting Module program within the context of Docket No. 19528. In this regard we also believe the record in this matter suffices for our deliberations and that oral argument is neither necessary nor helpful in this matter.

5. The Commission also has pending before it (1) a Petition filed December 27, 1973, by the North American Telephone Association For Amendment of Procedures, Issuance of a Notice of Proposed Rule Making and Establishment of Interim Procedures relative to the interconnection of customer-provided terminal communication equipment and systems and (2) a Motion filed September 26, 1974, by the Computer and Business Equipment Manufacturers Association for Separation of Issues and for an Order Authorizing a Program of Direct Interconnection of Customer Owned Data Terminal Equipment and Ancillary Telephone Equipment. In view of the action we are taking herein, we will dismiss these pleadings as moot.

BACKGROUND

6. This Commission and the courts have consistently enunciated the subscriber's right to make beneficial use of an interconnected device or communications system without causing harm to a telephone company's operations. On remand in *Hush-A-Phone*,[1] the Commission enunciated the following broad principle of law and policy:

> In addition to invalidating the defendants foreign attachment tariff regulations insofar as they bar the use of the Hush-A-Phone device, an inescapable consequence of the Court's opinion is to render such tariff regulations unjust and unreasonable *insofar as they may be construed or applied to bar a customer from using other devices which serve the customer's convenience in his use of the facilities furnished by the defendants and which do not injure the telephone*

[1] *Hush-A-Phone Corp. v. U.S.*, 99 U.S. App. D.C. 190, 238, F. 2d 266 (D.C. Cir. 1956).

> *companies' employees or facilities, or the public in the use of defendants' services, or impair the operation of the telephone system. As we construe the Court's opinion, a tariff regulation which amounts to a blanket prohibition against the customer's use of any and all devices without discriminating between the harmful and harmless encroaches upon the right of the user to make reasonable use of the facilities furnished by the defendants.* Such a regulation goes beyond what is reasonably required in the interest of protecting the defendants' employees, facilities, the telephone system and the public from adverse effects. (emphasis supplied) 22 FCC 112, 113–114 (1957)

7. Relying on the holding *Hush-A-Phone, supra*, we found in *Carterfone*[2] that a device used to interconnect mobile radio systems to the interstate and foreign message telecommunications system filled a need, that its use did not adversely affect the telephone system, and that the AT&T tariff prohibiting its use was unreasonable and unlawful within the meaning of Section 201(b) of the Communications Act of 1934. In making it clear that our *Carterfone* decision was not limited to the Carterfone device *per se*, but was rather a broad general policy, we stated:

> In view of the unlawfulness of the tariff there would be no point in merely declaring it invalid as applied to the Carterfone and permitting it to continue in operation as to other interconnection devices. This would also put a clearly improper burden upon the manufacturers and users of other devices. The appropriate remedy is to strike the tariff and permit the carriers, if they so desire, to propose new tariff provisions in accordance with this opinion. 13 F.C.C. 2d 420, 425

8. We further held that this broad *Carterfone* policy applied equally to devices which had direct electrical connections.[3] We noted that AT&T considered this to be a special category but had not clearly demonstrated the basis for this exception[4] (14 F.C.C. 2d 571, 573 (ftn. 4)), and went on to comment:

> The primary contention upon reconsideration is that our decision permits the use of a myriad of customer-provided devices for interconnection without adequate exploration of the technical and economic problems. This record convinces us that there can be interconnection without harmful technical effects. With respect to possible economic effects from the interconnection of private systems—"the piecing out of common carrier services with unregulated systems"—no substantial effort was made on this record to demonstrate any harm from the interconnection of private mobile radio systems, and we therefore had no occasion to address ourselves to that question. We agreed that economic effects upon the carriers' rate structure might well be a public interest question. But it is an issue, if a carrier seeks to raise it, to be decided upon the facts, i.e., will there be a "cream skimming" effect, what will be the extent of it, and how does it weigh against the benefits of interconnection. *As is the case with the question of technical harm, a tariff is unreasonable if it assumes a priori a conclusion as to such an issue.* (emphasis supplied) (footnotes omitted). 14 F.C.C. 2d 571, 572–573.

9. We did not prescribe the terms of the tariff revisions required to satisfy the *Carterfone* policy, but left that to the initiative of the telephone company. AT&T filed new and revised tariffs and subsequent amendments on behalf of itself and concerned interstate carriers, which allow the interconnection of customer-provided equipment (1) through the use of carrier-supplied connecting arrangements subject to certain technical requirements, and, if required, network control signalling units; (2) in accordance with a carrier-administered attesta-

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[2] *Carterfone*, 13 FCC 2d 420 (1968), reconsideration denied, 14 FCC 2d 571 (1968).
[3] *See ITT v. General Telephone and Electronics Corp.*, 518 F. 2d 913, 933 (9th Cir. 1975).
[4] *See Phonetele, Inc. v. California Public Utilities Commission*, 11 C. 3d 125, 520 P. 2d 400 (1974).

tion program for headsets and non-powered conferencing devices; and (3) in accordance with a carrier-administered program for conforming answering devices.

10. The *Carterfone* Decision placed the burden of proof squarely upon the carriers—not the users or this Commission—to demonstrate that a particular unit or class of customer-provided equipment would cause either technical or economic harm to the telephone network, note 4, *supra;* this burden was to be met *prior* to the filing of a tariff restricting the use of such equipment. The information accompanying the tariff revisions filed pursuant to *Carterfone* did not demonstrate that the direct electrical connection of all customer-provided equipment would cause harm unless accomplished through the carrier-supplied connecting arrangements provided for in the tariff. At best, it simply reflected one manner in which to protect the network. It was not even argued that this protection was the minimum protection required or the most cost effective. Nevertheless, the Commission, exercising an abundance of caution in protecting the telephone network from any possible harm, allowed the tariffs to become effective without ruling explicitly on their lawfulness.[5]

11. At the same time, the Commission instituted informal proceedings to obtain technical and operational data to assist its evaluation of the public interest factors involved in liberalizing the network control signalling unit and connecting arrangement provisions of the revised tariffs. Contracts to study these possible revisions were issued to the National Academy of Sciences and Dittberner Associates, and their subsequent reports together with comments from interested parties indicated that consideration should be given to revisions in MTS and WATS offerings under a program that would protect the telephone network from four types of harm: (a) hazardous voltages; (b) excessive signal power levels; (c) improper network control signalling and (d) line imbalance. Thereafter, the Commission created two advisory committees, pursuant to Executive Order 11007, to study the possibilities of initiating such a standards program for selected classes of equipment such as (1) customer-provided PBX's and (2) automatic dialers and recording and answering devices.

DOCKET NO. 19528 PROCEEDINGS

12. On June 14, 1972, the Commission instituted this proceeding by Notice of Inquiry and Proposed Rule Making, 35 FCC 2d 539 (1972), to determine whether and under what terms, conditions, or limitations the interstate MTS and WATS tariffs should be revised to allow customers to have the option of furnishing any needed network control signaling units and connecting arrangements (or the functional equivalent thereof), and to determine what rules, if any, the Commission should adopt with respect to the foregoing. In addition, a Federal-State Joint Board was established pursuant to Section 410 of the Communications Act of 1934, as amended, to submit its recommendations to the Commission concerning this matter.

13. In our First Supplemental Notice in Docket No. 19528, 40 FCC 2d 315 (1973), we questioned whether, at that time, it was feasible

[5] *AT&T "Foreign Attachment" Tariff Revisions*, 15 FCC 2d 605 (1968), reconsideration denied, 18 FCC 2d 871 (1969).

from a technical, engineering, operational and administrative viewpoint to establish an optional program in lieu of or in addition to the present tariff requirements for carrier-provided network control signalling units and connecting arrangements and requested comments concerning a number of reports and proposals. These reports and proposals include: (1) the report and recommendations of the PBX Standards Advisory Committee; (2) the proposal of the Office of the Chief Engineer of this Commission; and (3) the proposal of the National Association of Regulatory Utility Commissioners (NARUC) Staff Subcommittee Report on Communication Interconnection. In addition to these specific proposals, we also invited comments concerning other alternatives such as: (1) the Rochester Telephone Company's NPD program; (2) the establishment of standards by the carriers and the incorporation of such standards in tariffs or technical references with the carriers being responsible for the program's enforcement; and (3) leaving the tariffs unchanged but requiring the carriers to improve their services and applying the same practices to both carrier and customer-provided facilities. The Joint Board we convened in this matter has reviewed these comments and issued its Recommended First Report and Order which is presently before us for consideration.

14. The Joint Board has proposed that customer and carrier-provided ancillary and data terminal equipment be directly connected to the telecommunications network if it is registered with the Commission under a program similar to this Commission's existing type acceptance program for radio transmitting equipment. The proposed plan is to apply to all terminal equipment other than PBXs, key telephone systems, main telephones, extension telephones and coin telephones. Registration is to be based on representations and test data submitted by an applicant to the Commission. If the representations and test data concerning a particular device are found to comply with specific interface criteria and other requirements and the Commission determines that it is in the public interest, convenience and necessity, such device would then be registered. The Joint Board proposal would require each device to have affixed to it installation, maintenance and operating instructions, and would allow connection of registered devices to the network to be accomplished through the use of standard plugs, jacks and other simple arrangements as provided in tariffs.

15. The California Public Utilities Commission in its General Order No. 138 has adopted rules permitting the direct attachment to the telecommunications network of customer-provided ancillary and data terminal equipment and of protective couplers where they have been certified by a registered electrical engineer qualified in the field of communications equipment. The program applies only to customer-provided equipment, not to carrier-provided equipment. Certification is based on the registered engineer's examination of the design and operating characteristics of the device, the manufacturer's quality control procedures, and the servicing. The test standards and enforcement procedures regarding these factors are not specified in the plan, but are left to the discretion of the registered engineer. After being granted a registration number, the manufacturer must keep records of his quality control procedures, and these records are to be examined annually

by the certifying engineer. Further, manufacturers or vendors must offer a maintenance contract with all certified equipment.

16. We have given careful consideration to American Telephone and Telegraph Company's (AT&T) connecting arrangement program (AT&T Tariff F.C.C. No. 263, Sections 2.6.4(A) (1), (2) and (3); 2.64(B)(1); 2.64(D)(1)(a)),[6] AT&T's manufacturer attestation program for customer-provided headsets and non-powered conferencing equipment (Tariff 263, Section 2.64(E)),[6] AT&T's conformance program (APCM program) for answering devices (Tariff 263, Section 2.6.4(F)),[6] the Rochester Telephone Company's NPD program (Tariff 263, Section 2.9), the reports of the National Academy of Sciences and Dittberner Associates, the various reports of the several advisory committees and subcommittees, the recommendations of the Federal-State Joint Board, the California registration program, and all the comments of the many parties who have participated throughout the various stages of the proceedings herein. In addition, we have noticed other reports and materials, and where such were used in arriving at our findings they are so noted. In the seven years which have elapsed since our *Carterfone* ruling, the carriers have been afforded ample opportunity to propose effective procedures and/or tariff conditions to prevent harm without unduly restricting a customer's basic right to make reasonable use of the facilities and services furnished by the carrier. This the carriers have failed to do (with the possible exception of non-powered conferencing devices, headsets and conforming answering devices). The evidence before this Commission amply demonstrates that many "special" entities (e.g., gas, oil, electric, and transportation companies, selected industrial firms, the Department of Defense, the National Aeronautics and Space Administration, and customers in "hazardous or inaccessible locations") have long been and continue to be allowed to connect their equipment and facilities directly to the telephone network by means less restrictive than carrier-provided connecting arrangements (Tariff 263, Sections 2.7.5, 2.7.6, 2.7.7 and 2.7.8) apparently without causing harm to the network. We also note that there has been no demonstration of network harm resulting from the interconnected operation of some 1600 independent local telephone companies and the Bell System (including small rural, municipal, and co-op systems)—many of whom purchase and connect without benefit of carrier-supplied connecting arrangements the identical independently manufactured terminal equipment for which the individual user must lease carrier-supplied connecting arrangements. Accordingly, in view of our findings in this proceeding concerning the mechanisms which can cause technical harm and effective means for preventing such harms, the Commission has now reached three separate and independent conclusions. First, the present tariff provisions requiring the use of carrier-supplied connecting arrangements impose an unnecessarily restrictive limitation on the customer's right to make reasonable use of the services and facilities furnished by the carriers. Second, they constitute an unjust and unreasonable discrimination both among users (or classes of users) and among suppliers of terminal equipment. Third, the standards and procedures prescribed herein for the registration with this Commission of protective circuitry and/

[6] Similar tariff provisions appear in other sections of Tariff 263 (MTS) as well as Tariff 259 (WATS).

or terminal equipment will provide the necessary minimal protection against network harm which has been specified in various carrier operating procedures and/or the recommendations of the Joint Board, the California PUC, the NAS and Dittberner studies, and the Commission's interconnect advisory committees, and will serve the public interest. Equipment containing the appropriate FCC registered protective circuitry, or FCC registered terminal equipment, may, following the effective date of this Order, be connected directly with the telephone network pursuant to the procedures set forth in these rules, without benefit of carrier-supplied connecting arrangements. Carriers may continue to provide such connecting arrangements, if registered, and may require their use for equipment not registered with the FCC or not used in conjunction with appropriate FCC registered protective circuitry. Except as herein provided, carriers may not require the use of such connecting arrangements or other interface devices or arrangements for FCC registered equipment or protective circuitry, and may not impose other tariff conditions contrary to the *Carterfone* policy without prior approval of the Commission.

THE FCC REGISTRATION PROGRAM

17. The program which we are adopting was designed with the goals of (1) protecting the public switched telephone network from harms which might be caused by connection of terminal equipment to the network and (2) keeping the program as simple and easy to administer as is reasonably possible with a minimum of government intervention. Basically the program allows users to connect any terminal equipment to the telephone network if such equipment is connected through protective circuitry registered with the Commission or if such equipment is itself registered with the Commission. The option of registering only discrete protective circuitry rather than the entire terminal equipment will (1) eliminate unnecessary documentation relating to total system design and performance criteria (Even for complex terminal equipment and/or systems, this option will require documentation relating only to the discrete protective circuitry.); (2) remove the need for filing proprietary information, thus eliminating the need to establish cumbersome procedures for handling such information; (3) allow users and manufacturers greater flexibility in satisfying the requirements of our registration program through the separate purchase of protective circuitry, if desired; and (4) enable us to administer our registration program with an absolute minimum of expense to both the government and private industry—to the benefit of the ultimate users—while at the same time protecting the public switched telephone network from harms which could be caused by the connection of faulty terminal equipment.

18. As noted above, the Federal-State Joint Board recommended that PBXs, key telephone systems, and main station, extension and coin telephones be excluded from the registration program at this time, thus requiring that these devices continue to be interconnected with the network via carrier-provided connecting arrangements. In this respect the Joint Board plan differed from that proposed in 1972 by the FCC's Office of the Chief Engineer, although the Joint Board largely adopted the Chief Engineer's proposal. Many parties have

urged that some or all of these classes of terminal equipment be included, and point to the Joint Board's failure to provide any basis for such proposed exclusion. While it did not explicitly so state, we believe the Joint Board's recommendation to defer inclusion of these devices was based primarily on technical concerns relating to the more complex network control signalling functions performed by some of these devices. In view of the clarification of network harms; the delineation of the roles, responsibilities and incentives of the various parties in protecting against these harms; and the registration standards and procedures contained herein, we believe that many if not all the technical concerns reflected in the Joint Board's exclusion of these equipment classes have been mooted. With this clarification, we are tentatively of the view that there is no valid distinction as to the potential for harm from any of the excluded classes of devices. However, since all parties may not have considered it necessary fully to address the inclusion of PBX's, key telephones, and main stations at this time, in view of the Joint Board's recommendation, we shall afford interested parties an opportunity to comment further on the inclusion of these classes of equipment. Accordingly, PBX's, key telephone systems, main station telephones, coin telephones, and equipment connected to party lines [7] will be exluded from the registration program established herein, pending further order of the Commission.[8]

19. Several of the parties to this proceeding have suggested that it would be inappropriate to adopt new policies concerning interconnection prior to collection and evaluation of the pertinent data filed in Docket No. 20003 concerning the economic effects of such interconnection. Recognizing that Docket No. 20003 constitutes a broad fact-finding investigation of the economic implications and interrelationships among a number of industry developments, policies, and practices—some instituted pursuant to regulatory policy, others carrier-initiated—we previously held that "the commencement of the notice of inquiry in Docket No. 20003 does not necessarily preclude further action in Docket No. 19528." [9] In short, the Docket No. 20003 inquiry is not to become a "dumping ground" for existing docketed proceedings. Consistent with *Carterfone*, *supra*, as well as the more recent decision in *Mebane*, 53 F.C.C. 2d 473 (1975), we will afford any carrier the opportunity to demonstrate the need to restrict specific instances or classes of interconnection on the grounds of economic harm, and will continue to examine the broad, long-term and interrelated implications of interconnection, jurisdictional separations, and rate structures in Docket No. 20003. The present decision relates only to the requirements which interconnected devices must satisfy in order

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[7] Since we do not now have interconnection criteria for party line service, we will, in the meantime, allow customer-provided terminal equipment to be connected through carrier-provided connecting arrangements as is now done under presently effective tariffs. Coin telephones are excluded because, under present regulatory policies, only telephone carriers may provide coin telephone service.

[8] While the rules proposed by the Joint Board listed extension telephones in the equipment to be excluded from the registration program at this time, we conclude that extension telephones properly fall within the category of "ancillary" devices included in the Joint Board recommendation. The record supports our view that there is no valid technical distinction between extension telephones and other "ancillary" devices. Because the standards adopted herein are equally applicable to extension telephones and because inclusion of extension telephones does not represent a significant departure from the Joint Board's recommendations, we feel that the public interest is best served by the prompt inclusion of extension telephones within the scope of our registration program.

[9] *Economic Implications Relating To Customer Interconnection, Jurisdictional Separations, and Rate Structures*, Docket No. 20003, 49 F.C.C. 2d 1238, 1240 (1974).

to avoid technical harm to the telephone network. In view of our findings in paragraph 16 above, we believe that the public interest would be best served by the prompt implementation of our registration program.[10]

20. The carriers have argued that, as they have every incentive as well as the technical and operational means to maintain a high quality service, a registration program for carrier-supplied equipment is unnecessary, and may impose additional expenses on them which must ultimately be borne by the telephone user. We do not question the carriers' dedication to high quality service, nor their desire and ability to protect the network from any harms which might be caused by carrier-supplied equipment. However, we note that carrier-supplied terminal equipment possesses the same *potential* for harm to the network as does customer-supplied equipment—particularly in view of the fact that much carrier-supplied equipment is purchased from independent manufacturers who market identical equipment to the general public. We also expect that the information provided by the carriers in their registration applications will be of considerable aid to the Commission as a benchmark against which other applications may be judged. Furthermore, when one participant in a competitive market is subject to regulatory constraints (e.g. registration of equipment) while another is not, there exists the possibility of using the registration, notification, and complaint standards and procedures for competitive advantage. In a related proceeding, the Courts have already commented on such a situation;[11] and the carriers themselves have made the same argument in similar circumstances. These countervailing considerations require a careful weighing to ascertain wherein the overall public interest rests. On balance, and particularly in view of the relatively straightforward and inexpensive registration program we envision, we believe the public interest will best be served by requiring that carrier-supplied terminal equipment be registered, and consistent with the Joint Board recommendation we shall so order. However, we plan to reexamine the situation within the first year of operation of this registration program to determine whether the public benefits of requiring registration of carrier-provided equipment continue to outweigh any costs resulting therefrom, and to rule accordingly.

Technical Requirements

21. The National Academy of Sciences, in its 1970 report to the Commission, identified four areas of potential "harm" which might arise as a consequence of permitting uncontrolled direct connection of equipment to the telephone network: (1) hazardous voltages, (2)

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[10] Our *Carterfone* policy has permitted the public to utilize various types of equipment with the public communications network. It is our firm belief that public benefits have resulted from this policy. The purpose of Docket 19528 is not to revisit *Carterfone* but rather to review the present limitations imposed on the attachment of equipment to this network. Thus, issues relating to the potential overall economic impact of the *Carterfone* policy are beyond the scope of this proceeding. The potential economic consequences of *any* decision in this proceeding are minimal, since they affect only the differential costs and revenues associated with customer-provided vis-a-vis carrier-provided protective circuitry and procedures—not with the terminal device *per se*. In view of this we would expect that the parties in commenting on PBXs, key telephone systems, and main station telephones would limit their arguments to relevant matters and not to the basic policy decision enunciated in *Carterfone*.

[11] *Hush-A-Phone v. U.S.*, 238 F. 2d 266, 268–69 note 9 (D.C. Cir. 1956).

excessive signal power levels, (3) excessive longitudinal imbalance, and (4) improper network control signaling. The National Academy of Sciences reported that the carrier-provided protective connecting arrangements protected against such "harms" within the boundaries of acceptableness regardless of the design of particular equipment connected thereto. Our program adopts a similar approach. We have specified the boundaries which may not be exceeded for each of hazardous voltage, signal power and longitudinal imbalance. Without requiring any particular circuit design to be employed, we have required that the design of registered terminal equipment and registered protective circuitry assure that these boundaries are not exceeded, and will continue not to be exceeded, under foreseeable usage and mechanical and electrical stress. Registered protective circuitry is required to provide assurance of conformance to our interface requirements regardless of the particular equipment connected thereto and regardless of what failure modes such equipment may manifest. Registered terminal equipment is required to provide such assurance under all foreseeable failure modes of such registered terminal equipment and of equipment expected to be connected thereto. Such assurance may be provided either by incorporating protective circuitry in the registered terminal equipment, or, alternatively, by virtue of a design which precludes violation of the boundary constraints.

22. With the exception of on-hook impedance, we do not believe it is necessary to impose standards upon network control signaling. We are not persuaded that individual violations of criteria on compatible network control signaling will have any significant effect upon the telephone service of other telephone network users. Improper network control signaling will most directly affect the telephone service of the user of equipment which generates improper network control signals. A user thus has no incentive to generate improper network control signals, as he will only decrease the utility of his own telephone service by so doing (e.g. fail to receive telephone calls, be unable to generate telephone calls, or reach wrong numbers); thus we feel that any problems which may arise will be self-correcting. We would note that the present telephone company-provided connecting arrangements do not fully protect against improper network control signaling,[12] and that since such connecting arrangements were first offered in 1969, the carriers have not increased the level of protection against improper network control signaling provided by their connecting arrangements. From this we conclude that improper network control signaling has not been a significant problem to the carriers, and that the presently-effective approach of specifying proper network control signals in the tariffs, and in informational materials ("Technical References") distributed to equipment manufacturers has been effective, and has provided the requisite protection. We encourage the carriers to continue to provide informational materials to equipment manufacturers and others concerning network control signaling,[13] and commend the reports of our advisory committees on PBXs, telephone

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[12] *See* Docket No. 19419 Tr. 3080–85; 3087–93; 4328–29; 4546–50; 4552–54; 4561–65; 4960–73, Testimony of L. Hohmann. Tariff F.C.C. No. 263, § 2.8.3.

[13] Section 68.110(a) imposes the requirement that the carriers supply compatibility information upon request; to the extent that such informational materials effect compliance with this rule, no additional action by the carriers will be necessary.

answering devices and telephone dialers to the attention of equipment manufacturers as one source of such information.

23. Should improper network control signaling proliferate on the telephone network, the point could be reached where telephone facilities which are shared among many network users (e.g. central office equipment, trunks, etc.) would be nonproductively engaged in reaching wrong numbers, and incompleted calls, etc., which would degrade the overall service quality. While we are convinced that such a situation will not arise, due to the self-correcting mechanisms previously noted, we would be receptive to amending our rules at any time to include evaluation of network control signaling functions of registered terminal equipment and registered protective circuitry, or to provide for manufacturer attestation of compatibility, should evidence to the contrary become available.

24. The technical requirements pertaining to registered terminal equipment and registered protective circuitry are contained in Subpart D of Part 68, and are explained in the following paragraphs. The term "reasonable application of earth ground", which appears in several of the rules in Subpart D, deserves particular note. Because the connection of earth ground to registered terminal equipment and registered protective circuitry may cause noncompliance with several of the technical requirements, it is important that such registered terminal equipment and registered protective circuitry be properly insulated and isolated from any "reasonable application of earth ground". In evaluating equipment, the following guidelines should be followed:

a. For protective circuitry, "reasonable application of earth ground" shall include physical contact of all exposed surfaces of the circuitry with a conductor connected with earth ground, and of physical contact of each non-telephone line connection with a conductor connected with earth ground, and with all possible combinations thereof;

b. For terminal equipment, "reasonable application of earth ground" shall include all reasonably foreseeable possibilities whereby earth ground may become connected with such equipment, including the possibility of physical contact of all exposed surfaces with a conductor connected with earth ground, the possibility of connection with earth ground of each power-line connection, and the possibility of connection with earth ground through foreseeable connection with other equipment.[14]

25. *Environmental Stress Simulation.* Registered terminal equipment and registered protective circuitry will be subjected to various environmental conditions during shipment and usage, and accordingly we have required, in Section 68.302, that harm does not arise in registered equipment either prior to, or after the application of therein-specified stresses.

26. The specified requirements on vibration, temperature and humidity cycling are directly in accord with the requirements on such cycling presently effective for conferencing devices, and are similar to those employed for Authorized Protective Connecting Modules (APCMs)

[14] Foreseeable additional connection, must include all expected possibilities, such as accessory sockets (e.g. an earphone jack).

used with answering devices, both of which equipment classes are presently directly connected with telephone facilities.[15]

27. The specification of the metallic voltage surge parameter is derived from two presently-effective programs. The requirement imposed on conferencing devices is that a 1000 volt peak surge, having a 10 microsecond rise time to crest and a 1000 microsecond decay time to half crest be applied to the tip and ring telephone connections during the off-hook state.[16] The requirement applied to APCMs is defined in terms of a test circuit which applies similar surges.

28. Various specifications of the longitudinal voltage surge parameter were suggested to us. The requirement imposed on conferencing devices is that three 2500 volt peak surges of each polarity, having a 1.2 microsecond rise time to crest and a 50 microsecond decay time to half crest be applied between all telephone connections, connected together, and earth ground, under all reasonable conditions of connection of the terminal equipment with earth ground. The Joint Board recommended the use of such a surge only where external power is supplied to terminal equipment.[17] Our answering device committee recommended that such a specification be applied to power-line connections of that type of terminal equipment (and further recommended that testing be conducted in stages—first by pulsing at 500 volts, then 1500 volts and finally at 2500 volts). The similar specification for APCMs is defined in terms of a test circuit which charges a 0.1 microfarad capacitor to 2500 volts, and which then discharges that capacitor through a 60 microhenry coil (dc resistance less than 2.0 ohms) to the tip and ring connections of the terminal equipment, across which is connected a resistance of approximately 132 ohms. Such a circuit applies a longitudinal voltage surge of approximately 2 microseconds rise time to crest and 10 microseconds decay time to half crest to the APCM under two conditions of test: first, with the non-telephone connections grounded and the pulse applied to the telephone connections, and second, with the telephone connections grounded and the pulse applied to the non-telephone connections. In both tests, ground connections are made through a 14 microhenry coil, and the current through this coil is required to be less than 0.3 amperes, peak.

29. The purpose of stressing terminal equipment with longitudinal surges is to determine whether such equipment will continue to conform to our technical requirements if it is subjected to a voltage surge resulting from lightning. Since lightning may affect either an exposed telephone connection, or an exposed power connection to the terminal equipment, the APCM techniques of requiring testing by simulating a lightning-caused voltage surge on both sets of connections has merit, and we have adopted this approach. Thus, our rule requires that 2500 volt peak surges of each polarity, having a 2 microsecond rise time to crest and a 50 microsecond decay time to half crest (formed as the worst-case combination of the APCM and other specifications) be applied *first* between the telephone connections and earth ground,

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[15] Similar requirements are recommended in our advisory committee reports, and in such reports detailed instructions on specific implementing tests are contained.

[16] This specification was also contained in our advisory committee report on answering devices.

[17] Section 68.304(b) of the Recommended First Report and Order of the Federal-State Joint Board.

under all possibilities of connection of the equipment with earth ground, and *second* between each power line connection and earth ground, and between each conductive surface on the exterior of the equipment and earth ground, with the telephone connections individually, and in combination, connected to earth ground.

30. *Leakage Current Limitations.* Registered terminal equipment and registered protective circuitry are required to be adequately insulated, to protect against telephone facilities becoming connected with power-line energy (hazardous voltages) and earth ground (longitudinal imbalance). While it is desirable to maintain perfect insulation between the telephone connections and power-line and/or ground, such insulation must be specified in terms of leakage current under the application of test voltages. We have had various specifications of such leakage current recommended to us.

31. The Joint Board recommended that 1500 volts, 60 Hertz, be applied to all possible combinations of interface leads, power leads, exposed conducting surfaces and common circuit ground and that the leakage current resulting therefrom be limited to 2.5 milliamperes, rms,[18] only in the case of equipment which is externally powered. California has required that leakage current in each of two test cases be limited to 2.5 milliamperes: (1) when 1500 volts is applied between telephone connections and power connections, and between power connections and exposed surfaces, and (2) when 1000 volts is applied between telephone connections and exposed surfaces.[19] In addition, California independently requires that power transformers have a voltage breakdown rating greater than 1500 volts between primary and secondary and between the transformer windings and (chassis) ground.[20]

32. The requirement on conferencing devices [21] is that leakage current from the telephone connections, strapped together, to exposed conductive surfaces (on the housing) and earth ground be less than 2.5 milliamperes under the application of 1000 volts, rms, 60 Hertz between the points under test (the specific test required is to gradually increase the test voltage from 0 to 1000 volts over a thirty second time period, apply the full 1000 volts for one minute, and then determine the leakage current after this 1½ minute time interval). The APCM specification separately tests the dielectric insulation on the APCM's internal isolating transformer, and the APCM's housing insulation. In the first case, 750 volts, rms, 60 Hertz is applied for sixty seconds between the telephone connections (connected together) and earth ground, with all non-telephone connections and conductive surfaces on the housing of the APCM also connected to earth ground, and the leakage current is required to not exceed 0.5 ma, rms. In the second case, 1500 volts, rms, 60 Hertz is applied for sixty seconds between the telephone and non-telephone connections (all connected together) and earth ground, with conductive surfaces on the housing of the APCM also connected to earth ground, and the leakage current is similarly required to not exceed 0.5 ma, rms.

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[18] Joint Board First Report and Order, Sections 68.304(c) and (d).
[19] California General Order No. 138, Section 5.4(c).
[20] *Ibid.*, Section 5.3(a).
[21] Section 6.3.2 of Bell System Voice Communications Technical Reference, PUB 45101, "Interface Specification 2001 (Non-Powered Conferencing Devices)", May 1973.

33. Our answering device committee recommended two separate requirements: first, that leakage between the telephone connections (connected together) and power connections not exceed 2.5 ma. rms., under the application of 1500 volts, rms, 60 Hertz, and second, that leakage between the telephone connections and all exposed conductive surfaces on the housing of such terminal equipment not exceed 2.5 ma, rms. under the application of 1000 volts, rms, 60 Hertz. Finally, our dialer committee recommended a slightly modified version of the answering device committee's specification whereby leakage current is required to not exceed 2.5 ma. rms. first, between the telephone connections and earth ground, and second, between the power connections and earth ground, under the application of 1000 volts, rms, 60 Hertz and 1500 volts, rms, 60 Hertz, respectively. The dialer committee also recommended that the 1500 volt test requirement be dispensed with for equipment not connected to an external source of power.

34. The only case of a leakage current specification lower than 2.5 ma. rms. having been employed has been the APCM specification. AT&T's use of the 2.5 ma. rms. specification for conferencing devices (which predates the answering device tariff exception), as well as the consistent use of this figure by our advisory committees and by the Joint Board and California, convinces us that 2.5 ma. rms. is a reasonable leakage current limit. As the Joint Board's requirement of determining leakage current under the application of 1500 volts, rms. for all possibilities of leakage current (power line to telephone connections, power line to exposed conductive surfaces, and telephone connections to exposed conductive surfaces) is inclusive of possible lower test voltages for some of these leakage current paths, we are adopting the Joint Board's uniform use of 1500 volts, rms. for evaluation, with the proviso that leakage current tests be performed on terminal equipment regardless of whether it is connected to an external power source.

35. *Hazardous Voltage Limitations.* Section 68.306 sets forth "fail safe" requirements on hazardous voltage. The stated limits are generally employed throughout the telephone industry as voltage limitations below which special protection of telephone craft personnel is not required. Equipment must be designed to avoid the application of voltages exceeding these limits under normal operation, since our other technical rules specify that permissible metallic ac voltages in normal operation, are defined by the signal power limitations (which are on the order of one volt, rms). The hazardous voltage limits are worst-case equipment failure limitations, and evaluation of equipment for compliance with these limits requires an analysis of all foreseeable failure modes of the registered terminal equipment or registered protective circuitry, and of equipment which is reasonably expected to be connected thereto. Subsection (b) of this rule defines what we expect to be a worst-case failure mode of equipment which might be connected with registered protective circuitry—the application of commercial power line voltage. We have chosen to require evaluation of the effects of applying 220 volts, rms, to protective circuitry in recognition of the usage of such power in data processing installations and commercial wiring, and in the belief that power sources which are reasonably expected to be available at locations where registered terminal equipment and registered protective circuitry will be employed will not exceed 220 volts, rms.

36. The specific limits which we have chosen conform to the recommendations of our PBX Advisory Committee and to AT&T's statements in a pending proceeding, Docket No. 19419, wherein AT&T stated the limits it employs for voltages permitted on its telephone plant. In Docket No. 19419, AT&T testified that the allowable voltage levels for continuous ac voltages are 70 volts, peak,[22] and for continuous dc voltages the limit is 135 volts to ground.[23] Our PBX Advisory Committee has recommended the following voltage limits between telephone conductors: 71 volts, peak ac, 135 volts, dc, 142 volts, peak for combined ac and dc: and the following voltage limits between a telephone connection and ground: 71 volts, ac, 135 volts, dc, 71 volts, peak for combined ac and dc. We have specified voltage limits which conform to both the PBX Advisory Committee's recommendation, and to AT&T's statement, as follows: between telephone conductors: 70 volts, peak ac, 135 volts, dc, 140 volts, peak for combined ac and dc; and between a telephone connection and ground: 70 volts, peak ac, 135 volts, dc, 70 volts, peak for combined ac and dc.

37. *Signal Power Limitations.* Signal power in the 300–3995 Hertz band is required to conform to two different criteria: (1) the three second averaged power, measured at a customer's premises is required not to exceed 1.00 milliwatt, and (2) the three second averaged power measured at a telephone company central office is required not to exceed 12 decibels below 1.00 milliwatt.[24] The first of these specifications is constant for all installations, whereas the second is variable, as different local loop attenuations will permit equipment at the customer's premises to apply differing maximum signal power levels at the premises without violating the central office power level limitation.

38. In the case of voice usage of the telephone network, the telephone companies have chosen to employ physical protection within their connecting arrangements only against violations of the first criterion above, i.e. the 1.00 milliwatt limitation measured at the customer's premises.[25] Since there has been no evidence of problems arising from this telephone company practice, our rule follows this approach.

39. The telephone companies have argued that data equipment does not necessarily use telephone facilities in the same manner as does voice equipment; i.e. that data signals do not follow the statistical patterns of voice signals and tend to present constant amplitude tones. They also argue that data signals of excessive power have a higher potential for causing loss of communications privacy of other telephone network users than would voice signals of similar excessive power, and that data users have some incentive to violate the power level limitations in order to lower their data error rates. Data equipment manufacturers have argued that there is no incentive for users to exceed the power level limitations as degradation to their data communications service may result, and that the telephone companies' suppositions have not been substantiated.[26] We are taking no position as to the validity of these

[22] "Peak" voltage is intended to mean one-half the peak-to-peak amplitude excursion of an alternating voltage waveform.

[23] Bell Exhibit No. 3 in Docket No. 19419, testimony of L. Hohmann.

[24] Tariff F.C.C. No. 263, Message Telecommunications Service, Section 2.6.4.

[25] This has been done on the theory that due to the statistical nature of human speech, and disincentive to violate maximum power level requirements when humans are speaking, prohibitory language concerning the remaining power limitation which is contained within the tariffs, and in informational material distributed to equipment manufacturers ("Technical References") provides adequate protection.

[26] These arguments have been advanced both in this proceeding and in Docket No. 19419.

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arguments, as this is at issue in a pending proceeding, Docket No. 19419. We note, however, that the carriers' present data access arrangements provide assurance of compliance with both sets of power limitations, the 1.00 milliwatt customer's premises limitation and the 12 decibel lower central office power limitation. Pending the outcome of Docket No. 19419, and expressly subject to the ultimate findings and conclusions which may be reached therein, we are establishing rules for connection of data terminal equipment which maintain the *status quo*. Our rules accept AT&T's proposals for dealing with data equipment signal power levels, as a practical and reasonable means of providing such protection.

40. A data equipment manufacturer is given the option of either designing its terminal equipment, or protective circuitry, to assure that data signal power levels do not exceed a universal, fixed level of −4 dB with respect to one milliwatt, measurable at a simulation of the interface, or, if it wishes to optimize performance of equipment on each specific telephone line to which it may be connected, it has the option of designing terminal equipment, or protective circuitry, to assure that the data signal power level does not exceed the particular, unique level, which that telephone line permits without exceeding the −12 dB central office limitation. Again, following AT&T's proposal, we are adopting the requirement of using a design of such equipment or circuitry which is capable of responding to information which the carrier will provide as to the particular permitted signal power level for each telephone line to which the customer intends to connect data equipment. The carrier will determine the particular permitted power for each telephone line for which it receives notification that its customer intends to connect data equipment to a Programmable Data Jack, and will make appropriate connections in the Jack to communicate this information, automatically, to the data equipment, thereby removing the possibility of improper adjustment of the signal power. The specific evaluation required by Section 68.308(b)(2) assures that registered data terminal equipment, or registered data protective circuitry will appropriately respond to the information provided it by the Programmed Data Jack.

41. *Longitudinal Balance Limitations.* Section 68.310 sets forth minimum requirements on longitudinal balance. Longitudinal balance of terminal equipment depends upon the degree of balance of the impedance of the tip and ring connections of the terminal equipment to earth ground. Thus, evaluation of terminal equipment and protective circuitry designs for conformance to the longitudinal balance requirements must include consideration of all foreseeable possibilities of connection of such equipment and circuitry with earth ground.

42. We have received several different suggestions for an appropriate specification for longitudinal balance. The Joint Board and California recommended that each of the voltages on the two telephone connections (tip and ring) with respect to earth ground not differ by more than one percent, in the voice frequency band. Conferencing devices are required to maintain longitudinal balance, as given by the parameter we have defined in our "Definitions" section, greater than (120—20 $\log_{10}$ frequency) over the frequency range of 60 to 4000

Hertz, which is about 85 decibels at 60 Hertz and 48 decibels at 4000 Hertz.[27] Our answering devices advisory committee recommended that this same balance parameter exceed 40 decibels over the 60 to 4000 Hertz frequency range, and specified a particular test circuit for determining balance in accordance with this parameter. Our PBX advisory committee also recommended a minimum balance of 40 decibels over the 300 to 3400 Hertz frequency range.

43. We are rejecting the specification advanced by the Joint Board which is ambiguous. This specification is stated in terms of percentage, without stating the base on which such percentage is to be computed. Proper design of equipment intended for connection to the switched telephone network requires that essentially no longitudinal voltage be applied by terminal equipment at the interface. The ambiguous specification employed by the Joint Board will not necessarily insure this.

44. The longitudinal balance parameter which we have defined has been used by our advisory committees, and by the telephone companies in setting requirements on conferencing devices. We have also defined the balance parameter in terms of a particular test circuit which may be applied to terminal equipment to further remove ambiguity. This test circuit was advanced by our answering device advisory committee in its report.[28] In our view, the answering device advisory committee's requirement of testing longitudinal balance with an applied longitudinal voltage of 12.5 volts, rms (that is, by applying equal voltages of 25 volts, rms, to tip and ring) is sound, as semiconductors which only enter the "active" state on the application of a sufficiently high test voltage will thereby be activated. The remainder of the advisory committee's test circuit flows from the definition of the balance parameter. Finally, we have adopted the balance requirement which the telephone companies have required of conferencing devices. Such devices are presently exempt from the general tariff requirement of connection solely through a protective connecting arrangement which prevents longitudinal imbalance from affecting a telephone line. The telephone companies' requirement on conferencing devices is a clear and unambiguous statement by them of what they consider acceptable. Thus, the longitudinal balance is required to exceed ($120-20 \log_{10}$ frequency) at all frequencies in the band 60 to 4000 Hertz.

45. *On-hook Impedance Limitations.* As previously noted, we are persuaded that protection against improper network control signaling is not generally required. However, there is a need to impose conditions on one aspect of network control signaling—the on-hook impedance. If a telephone call is made to a telephone line to which an excessively low impedance is connected, or to a telephone line which causes excessive dc current to flow during the application of a ringing signal, the called party's central office will immediately cause the ringing signal to cease. The calling party will hear no audible ringing tone (a "ringback" tone) and will assume that the call did not go through.[29] We are

[27] Section 6.3.5 of Bell System Voice Communications Technical Reference, PUB 45101, "Interface Specification 2001 (Non-Powered Conferencing Devices)", May 1973.

[28] See Section 5.10 of the Advisory Committee Report on Answering Devices, May 21, 1973.

[29] See Bell Ex. 5 and Tr. 4004–05 in Docket No 19419 for discussion of "pretrip" and "false trip" and the expected effects thereof.

persuaded by the carriers' arguments that after several repeated tries to complete such a call, the caller will usually involve telephone company repair personnel. To prevent this non-productive use of telephone facilities, we are requiring assurance that on-hook impedances (the impedances presented to a ringing signal) are adequately controlled.

46. However, the particular permitted on-hook impedance on any given telephone line is variable, and depends upon such factors as the length of the line, the type of central office, and the electrical characteristics of the line (and in the case of PBX trunk connections, may depend on whether or not double-speed dialing is to be used). Normal telephone lines may be connected with one to five paralleled standard telephone ringers, depending upon these factors. The telephone companies have dealt with this requirement by rating each telephone line for the maximum number of "ringing bridges", or paralleled standard ringing impedances, through the use of tables which account for the factors involved in such a determination.[30] When a telephone company customer requests that additional equipment be provided by the telephone company (including equipment such as a connecting arrangement), the telephone company determines whether the addition of such equipment will exceed the "ringing bridge" limitation on the customer's telephone line.

47. We have established a similar mechanism for all terminal equipment. Section 68.312(b) requires that a determination be made as to the equivalent number of standard telephone ringers (the Ringer Equivalence Number), which one unit of registered terminal equipment or registered protective circuitry represents.[31] The customer merely adds the number of ringers which are connected to a telephone line to the Ringer Equivalency Number which will appear on the label[32] of registered terminal equipment or registered protective circuitry which he may wish to connect. The sum must not exceed the "ringing bridge" maximum which the telephone company specifies for his particular line. This technique imposes no additional record-keeping requirements on the telephone companies as it follows their already-established practices. At the same time, it provides some added flexibility to equipment manufacturers, as they are not limited to using the *same* impedances as the telephone companies' telephone sets now use—they may use higher impedances and thereby permit more equipment to be connected to a customer's telephone line.

48. Our specific test requirements are drawn from the telephone companies' submitted ringer impedance curves and from comments of

[30] Section 812-015-170 of the Bell System Practices, AT&T Company Standard, Issue 2, June 1972 "Ringing Ranges and Ringing Bridge Limitations for Lines in Dial Offices"; Section 471-100-040 of the General System Practices, GT&E Standard, Issue 1, January 1968 "Line Leakage and Ringing Bridge Limitations". Official notice of both of these documents is hereby taken.

[31] Figure 1 of Section 68.216(a) of the Joint Board's Recommended First Report and Order is an incorrect (and ambiguous) graph of a standard ringing impedance. This graph was first published by our answering devices advisory committee in its draft and final reports on requirements for such devices during 1973, and was (apparently) reproduced by the Joint Board. AT&T and GTE both maintained at the time of publication of the answering devices report, and in their comments on the Joint Board Report that the curve was incorrect, but until we informally requested that a correct curve be furnished, no such curve was supplied. In furnishing a corrected curve, AT&T and GTE indicated that in order to provide such information, they recently ran laboratory tests specifically to derive the correct curve.

[32] Section 68.300(a) of our rules requires that the Ringer Equivalency Number, determined in accordance with Section 68.312, be displayed on the equipment label.

the telephone companies on the answering device advisory committee's report. Since the telephone companies have provided us with magnitude-impedance versus frequency curves which were obtained through the use of a 10 volt, rms, test oscillator, we have similarly required that determinations of magnitude-impedance be made using a 10 volt source. The advisory committee report specified 1.5 ma as the maximum permitted dc current to be drawn by a ringing impedance during the application of a simulated ringing signal, and we have adopted this specification. As General Telephone and Electronics had commented that their central offices use ringing signals in the frequency range of 16⅔ to 66⅔ Hertz, and ringing voltages that might be as high as 75 volts dc superimposed on 100 volts, rms, we have adopted these parameters as an inclusive specification which is slightly more stringent than AT&T's use of 20 or 30 Hertz ringing signals at slightly lower voltages.

Standard Plugs and Jacks

49. Section 68.104 requires that, except for telephone company-provided ringers, all terminal equipment be connected to the telephone network through standard plugs and jacks. Telephone company-provided ringers are excepted so as to permit a customer to have a permanently connected ringer not subject to accidental disconnection. The general requirement for standard plugs and jacks is based on the assumption that any user will be able to plug in terminal equipment without special installation instructions or training. By imposing this requirement, we believe it is unnecessary to impose special requirements pertaining to installation of registered equipment.[33] We have purposefully declined to prescribe specific standard plugs and jacks, including a Programmed Data Jack design, in the belief that acceptable designs will be voluntarily arrived at by cooperative action between the carriers and the terminal equipment industry.

If jointly sponsored designs for standard plugs and jacks are not expeditiously arrived at, we will prescribe specific designs. We will require that any entity be permitted to manufacture and supply standard plugs for use with registered terminal equipment and registered protective circuitry, without being subject to licensing by a telephone company and without any other telephone company-imposed restrictions.

Notification to Telephone Company

50. We have included a requirement that any customer desiring to connect terminal equipment to the telephone network must give notice to the telephone company. This will allow the telephone company to keep complete and accurate records of all equipment connected to each telephone line, and will aid in the performance of both routine maintenance and repairs. It will also enable the telephone companies to have at their disposal certain statistical information regarding interconnection (which may at a future date be required to be furnished this Commission). Since the notification to the telephone company

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[33] We note that this approach has already been adopted by the telephone carriers' attestation program for headsets and non-powered conferencing devices, by their conformance program for answering devices, and by their long standing practice of providing portable extension telephones.

includes the F.C.C. Registration Number, this information will enable the telephone company to identify all customers using a particular type of registered equipment, if it should become necessary to notify such customers, in special circumstances such as revocation of an equipment registration number. Furthermore, since the notification also includes the Ringer Equivalence Number, the telephone company will be able to inform its customers as to whether such registered equipment may be connected to the telephone line without exceeding the ringing bridge limitation (maximum number of ringers which may be connected) for that telephone line.

Incidence of Harm

51. Although our rules are designed to assure that no harm from terminal equipment will ever reach the telephone network, Section 68.108 gives the telephone company the right to temporarily discontinue a customer's service, should any harm to the telephone network be caused by such customer's terminal equipment. Assuming full compliance with all the rules and regulations in Part 68, we would expect that no such temporary discontinuances would occur; however, out of extreme caution, we believe that the telephone company should have the option available to it of temporarily discontinuing a customer's service, should the facts of a given situation clearly warrant such extreme action. If a complaint is brought against the telephone company as a result of a temporary discontinuance, the telephone company will have the burden of proving that such action was reasonable.

Repair of Equipment

52. Section 68.216 sets forth our requirements on the repair of registered terminal equipment and registered protective circuitry.[34] In order to maintain the level of assurance accorded by the design and manufacture of such equipment, repairs must be performed by the manufacturer or assembler of such equipment or by their authorized agent. However, we will allow routine repairs, such as fuse replacement, the changing of a pilot lamp, etc., to be performed by users, where the manufacturer or assembler satisfactorily demonstrates that the performance of such routine repairs will not result in a violation of the requirements of Subpart D of our rules. This limited exception, however, is to be construed narrowly, as we do not wish it to open the door to uncontrolled maintenance activities which may have some effect upon compliance with our technical requirements.[35]

Registration Procedures

53. Subpart C of the rules contains all the rules governing the procedures to be followed in registering terminal equipment and protective circuitry. These rules have been designed to insure that the Commission retains complete control over the registration program, while at the same time the required interaction between industry and the Commission is reduced to a minimum. We have accomplished this by adopting

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[34] Section 68.216 is in no way intended to limit a user's ability to repair any parts in terminal equipment other than registered protective circuitry.

[35] We would note that where registered protective circuitry is fabricated on a plug-in subassembly in such manner that by no foreseeable failure to properly insert or remove such a subassembly, can a violation of the requirements of Subpart D of these rules occur, then we would consider the limited exception to this rule as applicable if the user "repairs" failed registered protective circuitry by plug-in replacement.

a plan whereby equipment sought to be registered is to be tested by the manufacturer or assembler rather than the government with the test results submitted along with the application for registration. While we do not expect that the administration of this program will routinely entail physical examination and/or testing of terminal equipment or protective circuitry, the Commission specifically reserves the right to do so upon complaint or upon its own motion. We feel that this approach is simple and efficient from a regulatory point of view and will entail a minimum of administrative and other expense.

54. While we have provided that applications for registration will be placed on public notice, we wish to stress that we will not permit this procedure to become a means for delaying registration grants. All comments must be supported by relevant data and address the capability of the equipment or circuitry to comply with the technical requirements of Subpart D. Comments addressing other issues will not be entertained. In setting forth the rules relating to registration procedures, we have not specified the particular form an application should take nor have we indicated appropriate fees for registration. These, and other procedural matters will be addressed in future orders prior to the effective date of these rules.

CONCLUSION

55. We conclude that the Federal registration program described above and set out in the appendix hereto will provide the necessary protection for the telephone network from harms caused by the connection of terminal equipment thereto, and that adoption of this program will serve the public interest. In view of the action we are taking herein, i.e., adoption of a Federal registration program applicable to all classes of terminal equipment, we have further concluded that the proceedings in Docket No. 19528 should be terminated. However, as the registration program established herein is new, we believe it should be subject to continuing review and modification, if necessary, as actual experience under the program warrants. Accordingly, the Commission will continue to confer, as appropriate, with state commissions concerning those interconnection matters over which the state commissions and this Commission have jurisdiction.

ORDER

56. In view of the foregoing, IT IS HEREBY ORDERED, pursuant to Sections 4(i), 4(j), 201–205, 208, 215, 218, 313, 314, 403, 404, 410 and 602 of the Communications Act that the Commission's Rules and Regulations are amended by adding a new Part 68 as shown in the appendix hereto, effective April 1, 1976.[38]

57. IT IS FURTHER ORDERED That the pleadings mentioned in paragraph 4 above are DENIED and the pleadings mentioned in paragraph 5 above are DISMISSED.

58. IT IS FURTHER ORDERED That interested parties may file comments not later than December 11, 1975, directed to the planned

[38] Part 68 of the Commission's Rules and Regulations is not applicable to terminal equipment connected to the telephone network prior to the effective date of these rules.

inclusion of PBXs, key telephone systems and main station telephones in our registration program.

59. IT IS FURTHER ORDERED That AT&T revise its Tariffs F.C.C. Nos. 259 (WATS) and 263 (MTS), on not less than 60 days notice, in accordance with the requirements of this Report and Order, to be effective on the effective date of the rules in Part 68.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

(In re Connection of Terminal Equipment to the Telephone Network)

As a member of the Federal-State Joint Board which has been working on interconnect problems for the past several years, I concur in the main with the program hereinabove devised as a plausible solution to the principal issue of physical harm to the existing network. While the program is no doubt imperfect, and experience is likely to expose deficiencies in operational aspects (*e.g.*, attribution of responsi-

bility for malfunctions, assessment of service costs, enforcement against non-complying manufacturers, installers and maintenance suppliers, accreditation of testing sources), the Commission, for better or worse, has made the fundamental judgment that terminal interconnection is in the public interest; and, thus, reasonable standards are mandatory to effect this policy.

In concurring, however, I fully reserve the arguments I made in *Mebane Home Telephone Company of North Carolina*[1] with respect to expansion of our interconnection program in advance of the outcome of our Docket 20003 proceeding which is examining the economic impact of our interconnect policies. I remain concerned about the loss of revenues to the telephone companies, particularly—as in *Mebane*—the small, rural systems and cannot help but ponder the manner in which such losses, if significant, will be offset.

I cannot, nevertheless, fully join my majority colleagues in the requirement that telephone companies also register all their equipment with the Commission prior to installation.[2] Although sympathetic to the need to ensure that the telcos do not clamor for higher protection standards from independent manufacturers than imposed on themselves and favor an approach that assures that required competition is as fair as possible, registration of the phone companies' own equipment is an unnecessary over-reaction.

The telephone companies, unlike the independent manufacturers, have an inherent incentive in protecting the network (*viz.*, reduction of maintenance and service, promotion of overall telephone usage); that is why we have never required equipment clearance in the past. To do so now merely because some protection from foreign attachments is necessary is regulatory overkill which cannot be supported by logic or experience. We have ways, short of meaningless registration, to preclude possible anti-competitive practices. Our record, thus far, contains no such anti-competitive finding.

If, in the future, it appeared that the phone companies were abusing equipment clearance procedures for competitive advantage, we might impose such bureaucratic rigmarole as telco equipment registration as a last resort. We should not, however, impose such expenses on the public (through increased governmental and industry costs) at the outset.[3]

Accordingly, while I do not dissent to the program overall, the foregoing prevents my unqualified approval and I would have invited further comments on the telco registration aspect of our program because the issue is so unique.

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[1] 53 FCC 2d 473 (1975) (Commissioner Hooks, dissenting).

[2] Aware that I was part of the Joint Board which included telco registration of equipment in its proposal, the responses thereto have convinced me that such a requirement is wasteful of relevant resources.

[3] The requirement that over 1,800 independent (non-Bell) telephone companies register their own equipment (even if only by cross-reference) along with hundreds of unknown suppliers must mean an unnecessary proliferation of the bureacracy, whose job it will be to review and issue *pro forma* registration acknowledgments to telcos which already do an adequate job of protecting their network. While I do not subscribe to wholesale de-regulation and have urged an increase in our common carrier manpower to better regulate giants like AT&T (*GTE Satellite Corp.*, 43 FCC 2d 1168, 1169 (1973) (Commissioner Hooks, concurring)), I would use our scarce resources for tasks far more vital than what augurs to be cosmetic "make-work." While it is imperative that we know and understand what standards the telephone companies consider satisfactory if we are to intelligently regulate interconnection and undoubtedly should have secured such in the process of Docket No. 19528, discrete telco registration seems to be plain old red tape. File a form and pay a fee; timeless government response in the Computer Age.

104-015—75——7

Concurring Statement of Commissioner Glen O. Robinson

I believe that this is the proper time for the Commission to extend registration requirements to all terminal equipment, including PBX, key telephone and main station equipment and ancillary devices. Our information and understanding is at present sufficient to allow us to extend our registration program to all such equipment. The Commission apparently acknowledges that there is no valid distinction between devices required to be registered and devices to which the registration requirements do not apply, in terms of their potential for harming the switched network. However, because "all parties may not have considered it necessary to fully address the inclusion of PBX, key telephone and main stations" the Commission has decided to seek further comments on the inclusion of PBX, key telephone and main station equipment. I disagree with this decision.

The proposed registration of all such equipment was unmistakably included in the proposal originally advanced by the Chief Engineer. It was commented on by many parties. Every interested party has had, in ample measure, both fair notice and the fullest opportunity to comment on every aspect of this case, including the registration of PBX, key telephone and main station equipment. Moreover, I venture to guess that any attempt to distinguish between ancillary equipment and PBX, key telephone, and main station equipment on technical grounds [1] will prove to be futile. Futility may not stop the Commission, however, and in consequence, one must look for a host of new (and, needless to say, unnecessary) problems for us (or the courts) to resolve. First and foremost, what properly constitutes data and ancillary equipment? What rule can we prescribe that will distinguish between a data terminal with an auxiliary voice capability for coordination, and a voice terminal with an auxiliary data capability? How will the line be drawn between voice and data services? For a teaser on how difficult this definitional problem is now—leaving aside how impossibly difficult it will obviously become in the future—one need only consult the Bell product notice taken from *Communications News*, Nov. 1975, p. 85, set out in the margin.[2]

Consider the dilemma created by the existence of a customer-owned protective connecting module, that will have to be certified as able to protect the public switched network from all harms that can be generated by improper input signals. If a user were to connect a voice terminal to the network through such a protective module, there would be no occasion for us to require disconnection because there would be no risk of technical harms to the system; the module is supposed to protect (and we certify that it does in fact protect) against those very harms. The principle of allowing customer-owned equipment to be interconnected to the public switched network is well established. We should not, therefore, be telling the users: "No, you

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[1] We can set aside economic considerations insofar as these are, as the Commission emphasizes, not properly embraced within this proceeding.

[2] Telephone for Electronic Funds Transfer Functions.—The Transaction II telephone for credit-card authorization, check verification, and other electronic funds transfer functions is designed for use in systems not equipped with audio-response units as well as voice-response applications. The telephone features an 8-character visual display, hands-free operation, and the ability to operate both in a voice-only system and in a data-oriented system. The Transaction II telephone contains all of the features of the Transaction I telephone including optional green/yellow lamp operation using keyed answer tone reception. A data receiver which operates at 150, 110, or 75 b/s with frequency-shift keyed data is also featured. Use card or write *AT&T, 195 Broadway, New York, New York 10007.*

cannot interconnect your equipment through your module; instead, you must rent a connecting module from the carrier even though we know that your module will protect the network from all possible harms." Such a position is illogical formally; it is not consistent with our policy of promoting competition, and (beyond either of those objections) it is unwise on its own merits.

One final comment on the scope of our registration program. For the present, I concur in the Commission's decision to require registration of carrier-supplied equipment. However, because I believe that the carriers do have an incentive, not shared by the interconnect companies, to protect the network against "harms," I concur in this requirement on the understanding that earnings will not necessarily be subject to the same technical standards as would be appropriate for interconnect companies. Thus, in judging carrier equipment, I assume we will take account of the special position of the carriers as network service providers and not merely equipment providers.

APPENDIX G

Second Report and Order in Docket 19528,
58 F.C.C. 2d 736 (1976)

F.C.C. 76-242

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PROPOSAL FOR NEW OR REVISED CLASSES OF INTERSTATE AND FOREIGN MESSAGE TOLL TELEPHONE SERVICE (MTS) AND WIDE AREA TELEPHONE SERVICE (WATS)	Docket No. 19528

SECOND REPORT AND ORDER

(Adopted: March 18, 1976; Released: March 18, 1976)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING AND ISSUING A STATEMENT; COMMISSIONER QUELLO DISSENTING.

1. In a First Report and Order herein (First Report), released November 7, 1975, 56 FCC 2d 593, the Commission established a registration program designed to allow users of the nationwide telephone network to connect terminal equipment other than PBXs, key telephone systems, main station telephones, and coin telephones to the network without the need for carrier-supplied connecting arrangements, provided they comply with the standards incorporated in the registration program to protect the network from harm. The standards and registration procedures are contained in a new Part 68 of the Commission's Rules.

2. While the Commission was tentatively of the view that main telephones, private branch exchange (PBX) equipment, and key telephone (KT) equipment presented no valid distinction as to potential for "harm," compared with equipment already within the scope of Part 68 (*see* First Report, paragraph 18), it offered parties to this proceeding an additional opportunity for further comment on their inclusion.[1] Comments were received from telephone companies (the Bell System Companies (hereinafter, AT&T), GTE Service Corporation and affiliated telephone companies (hereinafter, General), United Systems Service, Inc., and Continental Telephone Corporation) and their trade associations (National Telephone Cooperative Association; United States Independent Telephone Association); the United States Department of Justice; the Rural Electrification Administration (REA); the North Carolina Utilities Commission (NCUC); user groups (Association of American Railroads, Utilities Telecommunications Council, American Petroleum Institute, and Ad Hoc Telecommunications Committee); and equipment manufacturers and their trade associations (North American Telephone Association, Computer and Business Equipment Manufacturers Association, the Electronic Industries Association, International Telephone and Telegraph Corporation, Danray, Inc., Com-Path Division of Scott-Buttner Communications, Inc., and DASA Corporation).

[1] *See* 56 FCC 2d 626 (1975).

3. The comments listed in paragraph 2 above, fall into two general categories: *first*, there are comments which argue that it is inappropriate to include main station telephones, PBXs and key telephone systems within the scope of the FCC's registration program, and *second*, there are comments which argue that the Part 68 rules must be modified before including such equipment in the program.

4. Following the filing of these comments, the Federal-State Joint Board, on February 25, 1976, adopted a Recommended Second Report and Order, which recommended that main telephones, key telephone systems, and PBX equipment not be included in the registration program adopted by the Commission in its First Report and Order in this proceeding. This recommendation was based solely on the Joint Board's general fears concerning possible revenue losses the telephone companies may suffer as a result of competition in the terminal equipment field—not on any asserted danger of technical harm to the network.

Delineation of the Issues

5. The matter now before the Commission is a direct outgrowth of, and falls within the overall policy framework established by, the Commission's *Hush-A-Phone* and *Carterfone* decisions.[2] In *Hush-A-Phone* the Commission ruled, pursuant to judicial guidelines, that:

> In addition to invalidating the defendants' foreign attachment tariff regulations insofar as they bar the use of the Hush-A-Phone device, an inescapable consequence of the Court's opinion is to render such tariff regulations unjust and unreasonable *insofar as they may be construed or applied to bar a customer from using other devices which serve the customer's convenience in his use of the facilities furnished by the defendants and which do not injure the telephone companies' employees or facilities, or the public in the use of defendants' services, or impair the operation of the telephone system. As we construe the Court's opinion, a tariff regulation which amounts to a blanket prohibition against the customer's use of any and all devices without discriminating between the harmful and harmless encroaches upon the right of the user to make reasonable use of the facilities furnished by the defendants.* Such a regulation goes beyond what is reasonably required in the interest of protecting the defendants' employees, facilities, the telephone system and the public from adverse effects. (emphasis supplied) 22 FCC 112, 113-114 (1957).

6. In *Carterfone*, the Commission applied the same basic principles in ruling that a device used to interconnect mobile radio systems to the interstate and foreign message telecommunications system filled a need, that its use did not adversely affect the telephone system, and that the AT&T tariff prohibiting its use was unreasonable and unlawful within the meaning of Section 201(b) of the Communications Act of 1934. The Commission also made it clear that the *Carterfone* decision was not limited to the Carterfone device *per se*, but was rather a broad general policy.[3]

7. Pursuant to the *Carterfone* decision, AT&T filed tariffs (in which its connecting carriers concurred) which generally allowed the interconnection of all types of customer-provided terminal equipment, provided that direct electrical connection would be accomplished only through carrier-supplied "connecting arrangements," (interface devices

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[2] *Hush-A-Phone Corp. v. U.S.*, 99 U.S. App. D.C. 190, 238 F.2d 266 (D.C. Cir. 1956); *Carterfone*, 13 FCC 2d 420 (1968), reconsideration denied, 14 FCC 2d 571 (1968); *see also, Interstate and Foreign Message Toll Telephone, etc.*, 56 FCC 2d 593, 594-96 (1975).

[3] The parties recognized this and themselves argued on a broad policy basis. *See, Carterfone*, 13 FCC 2d at 425 (1968).

designed to protect the network from technical harm). Without ruling as to the necessity for or lawfulness of the tariff requirement that carrier-supplied connecting arrangements be employed, the Commission allowed the Carterfone tariffs to go into effect. Thus, since 1968, customers have been afforded the right pursuant to *Hush-A-Phone* and *Carterfone* to provide their own terminal equipment of all types, and independent manufacturers and distributors have been afforded the opportunity to supply such equipment to the public in competition with the vertically integrated telephone industry.

8. In recognition of the fact that the post-Carterfone tariff conditions continue to impose certain restrictions on both the customer and the independent supplier of terminal equipment, the Commission at the same time instituted informal proceedings to obtain technical and operational data to assist its evaluation of the public interest factors involved in the possible liberalization of the network control signalling unit and connecting arrangement provisions of the revised tariffs. Further, on June 14, 1972, the Commission instituted this proceeding by Notice of Inquiry and Proposed Rulemaking, 35 FCC 2d 539 (1972), to determine whether and under what terms, conditions, or limitations the interstate MTS and WATS tariffs should be revised to allow customers to have the option of furnishing any needed network control signalling units and connecting arrangements (or the functional equivalent thereof), and to determine what rules, if any, the Commission should adopt with respect to the foregoing.

9. On November 7, 1975, after lengthy proceedings in this Docket, the Commission issued its First Report and Order, in which it concluded that:

(1) The present tariff provisions requiring the use of carrier-supplied connecting arrangements impose an unnecessarily restrictive limitation on the customer's right to make reasonable use of the services and facilities furnished by the carriers.

(2) They constitute an unjust and unreasonable discrimination both among users (or classes of users) and among suppliers of terminal equipment.

(3) The standards and procedures prescribed for the registration with the F.C.C. of protective circuitry and/or terminal equipment will provide the necessary minimal protection against network harm, which has been specified in various carrier operating procedures and/or the recommendations of the Joint Board and others, and will serve the public interest.

10. While the proceedings in this Docket were continuing, the Commission initiated a broad fact-finding inquiry into the economic implications and interrelationships among a number of industry developments, policies, and practices—some instituted pursuant to regulatory policy, others carrier-initiated.[4] In its Notice of Inquiry in Docket No. 20003, the Commission stated it would look into the effect of current pricing practices and regulatory policies on the level and distribution of customer charges for various telecommunication services, and in particular on the extent to which various categories of customers are

[4] *Economic Implications Relating to Customer Interconnection, Jurisdictional Separations, and Rate Structures*, Docket No. 20003, 46 FCC 2d 214 (1974).

now or will be, under alternative pricing practices and regulatory policies, subsidizing the services received by others. Of particular concern in that proceeding are the comparative economic effects on both overall telecommunications costs and charges and on the costs and charges for different categories of both public and business customers, of such factors as the interconnection and use of customer-provided facilities, the use of specialized common carrier services in lieu of common carrier private line services, the use of flat-rate and other cost-insensitive pricing practices for local exchange services, and the jurisdictional separation of revenues and expenses for plant and facilities commonly used for both intrastate and interstate (including foreign) services.

Discussion

11. The issue now before the Commission in Docket 19528 has thus been clearly delineated as a consequence of prior Commission decisions extending back to *Hush-A-Phone.* The issue is not whether customers should be afforded the opportunity to interconnect their terminal equipment with the telephone network via direct electrical connections. That issue was decided by the Commission and the Courts in *Hush-A-Phone* and *Carterfone;* to the extent that parties may believe it necessary or desirable to revisit those decisions, that is a matter beyond the scope of this proceeding. Nor is the issue one of potential economic impact on the carriers. That issue was also addressed initially and disposed of in the *Carterfone* decision. To the extent that any specific cases of economic harm can be demonstrated, to such an extent as to affect the carriers' ability to continue providing essential public telecommunications services, parties have been and continue to be afforded the opportunity pursuant to *Carterfone* to make such a showing and to seek appropriate relief. To the extent that more general allegations and issues of potential future economic harm are concerned, such matters are being addressed in the Commission's concurrent and broad-ranging economic inquiry, Docket 20003. Thus, the single issue now before the Commission is whether, having adopted a terminal equipment registration program for the reasons cited in its November 7, 1975 First Report and Order, it is reasonable for any valid technical or legal basis, for the Commission to continue excluding PBX's, key telephone systems, and main station telephones from this registration program.

12. Certain parties (primarily the telephone companies) have argued—and the Joint Board has recommended—that main telephones, PBX and KT equipment should remain excluded from the scope of the F.C.C. registration program pending the outcome of the Commission's economic inquiry in Docket No. 20003. As noted above and in the First Report (see paragraphs 18 and 19, and footnote 10 thereto) such considerations do not fall within the scope of the Docket No. 19528 proceedings. From its inception, Docket No. 19528 has been concerned solely with the issue of technical harm. Economic issues, including questions concerning the continued validity of the *Carterfone* decision, are matters which may and are being addressed fully in other proceedings before the Commission without the necessity of delaying the 19528 proceeding. Pursuant to *Carterfone*, parties have been and continue to be afforded the opportunity to demonstrate specific instances

of economic harm as a basis for seeking relief from the full application of this policy. To date, only one party has sought a hearing on this basis, and that hearing was terminated prior to the introduction of evidence, at the petitioner's request.[5]

13. In Docket No. 20003, the Commission has also afforded parties the opportunity to present facts, studies, or opinions regarding both present and future economic effects resulting from a broad range of interrelated economic issues of general applicability (see paragraph 10, above), including, among other things, liberalized interconnection and competition in various sectors of the communications industry. Based on the information gained from this inquiry, we fully expect to institute further rulemaking or other proceedings as appropriate, dealing in a comprehensive and coordinated manner with both the carriers' alleged losses and the public benefits of competition. However, the Commission has made it abundantly clear from the first Notice of Inquiry in Docket No. 20003 that initiation of this proceeding would not necessarily preclude further action in Docket No. 19528. We do not intend, as some parties would have us do, to prejudge the outcome of the Docket No. 20003 inquiry in favor of *any* party. For the purpose of proceeding with Docket No. 19528 it is sufficient to note the absence to date of any showing before the FCC that any actual economic harm has been experienced much less that this has adversely affected any carrier's ability to serve the public. Comments received herein broadly allege some adverse economic impact without quantification.[6] Such allegations are not a demonstration of expected economic impact sufficient to require that the rights of connecting registered equipment under Part 68 to the telephone network be denied to all telephone subscribers, nationwide.

14. The Joint Board has also expressed concern that we not extend the registration program to PBX, KTS, and main telephones solely to promote competition for its own sake. This clearly is not, and has never been, the Commission's primary objective. The guiding principle in *Carterfone* and related decisions has been to afford the users of the nationwide telecommunications network greater flexibility and choice in their use of that network—through customer-provided terminal equipment—in ways which are privately beneficial without being publicly detrimental. By affording telephone customers more freedom of choice in the provision and interconnection of terminal equipment, the markets for such devices *have* expanded, and price competition and innovation on the part of both the telephone companies and independent equipment suppliers *has* resulted. This competition has increased the utility of the nationwide telephone network, a result which we consider both privately and publicly beneficial—but competition *per se* has not been the Commission's objective. Competition in the terminal market has existed since 1969 when telephone company tariffs filed in response to *Carterfone* permitted connection of customer-supplied

[5] *Mebane Home Telephone Co.*, FCC 75M-1788 (released October 17, 1975).

[6] GTE cites its allegations in Docket No. 20003 as some indication of the present contribution of PBX and KT equipment to its revenues, without quantifying how much of such contribution is expected to be lost as a result of applying Part 68 to such equipment. GTE merely assumes, without explanation, that 50% of the replacement and growth market would be penetrated by competition. Such assumptions and allegations are being thoroughly scrutinized in Docket 20003; but they can hardly be considered sufficient to justify further delay in this long-pending proceeding.

equipment through telephone company connecting arrangements. These connecting arrangements (for which a monthly charge is assessed) were never alleged to be necessary as an anticompetitive deterrent to the purchase of non-carrier equipment. Nor were they alleged to be necessary as a surcharge needed to produce revenue "contribution" to the telephone companies. Rather they were alleged to be necessary solely to protect the nation's telephone network from any technical harms which non-carrier terminals might produce. The F.C.C.'s registration program does not extend the area of competition; it merely removes what has been found to be an unnecessary and discriminatory carrier-imposed restriction on the manner in which customer-provided equipment may be connected to the network.

15. Some parties (again, primarily the telephone companies) take the position that Part 68 should not be extended to encompass main telephones, PBX and KT equipment as such equipment has a high incidence on the telephone network, and that the present inadequacies of Part 68 would become more acute. This argument is incorrect. First, the Commission's registration program has been drawn to achieve the same result as the telephone companies' own protective devices have achieved since January, 1969. Second, if equipment is actually harmful, the telephone companies have the right to disconnect it from the network by discontinuing service (Section 68.108 of the Rules), and thus actually harmful equipment will not remain connected to the telephone network. Third, to the extent that the technical requirements of Part 68 are inadequate (and in our view this is not the case), interested parties can petition for changes in the Part 68 rules at any time. Alternatively stated, the proper remedy for an allegedly inadequate technical requirement is not to deny the rights of connecting registered equipment under Part 68 to all telephone subscribers indefinitely. Rules often change as requirements change; the purpose of allowing petitions for rulemaking is to accommodate such changed requirements. With regard to the Part 68 technical requirements, it should be noted that many of the changes which Bell has suggested in an amendment to its Petition for Reconsideration, filed January 22, 1976, recommend *less* stringent parameters than are presently contained in Part 68.

16. Another argument is that (in GTE's view) main telephones should not be included as it is important that there be at least one telephone company-provided instrument on the customer's premise to assure compatibility with the telephone network and fulfill the telephone company's "end-to-end" service responsibility. However, the telephone companies have provided connecting arrangements without an associated telephone instrument, and therefore must have themselves concluded that there is no such necessity.[7] Second, in the First Report and Order, compatibility was distinguished from network harm (e.g., *see* paragraph 22, and Section 68.110(a) of the Rules). Third, the telephone companies do not even now have "end-to-end" responsibility

[7] F.C.C. Tariffs No. 259 (WATS) and 263 (MTS) impose no requirement for a carrier-supplied telephone instrument in addition to a connecting arrangement for connection of customer-provided terminal equipment and/or systems. Also, the alleged requirement is plainly impractical in the case of PBX trunks (presently used with connecting arrangements) which are not even compatible with a telephone instrument.

where customer-provided equipment is used. They are only responsible for the service which they provide. When a customer chooses to use equipment not provided by the telephone company, the telephone company is only responsible for providing adequate communication line service. Obviously, the telephone company cannot be responsible for the performance of equipment which it does not provide, install and maintain.

17. The telephone companies, and their trade associations, also oppose inclusion of telephone company-provided main station telephones, PBX and KT equipment for the same reasons as were stated in Petitions for Reconsideration of the First Report and Order. Both the Joint Board, in its Recommended First Report and Order, and the Commission, in its First Report and Order and its Memorandum Opinion and Order on reconsideration thereof (FCC 76-134, released February 13, 1976), have ruled that telephone company equipment should be included in the scope of Part 68. No new arguments have been advanced in support of changing present provisions of Part 68 with regard to telephone company-provided equipment, as applied to main telephones, PBX and KT equipment.

18. Many parties have filed comments addressing the applicability of the technical requirements of the Commission's present registration program to main telephones, PBX and KT equipment. Such parties have pointed out that the specific technical requirements of Subpart D of Part 68 will have to be varied to accommodate certain differences between telephone lines and telephone trunks (trunks are used with PBX equipment). In addition, the comments argue that specific parametric values which are presently contained in Subpart D should be changed to accommodate this equipment. We are addressing these matters below.

19. The general technical standards of Part 68, as presently stated in Subpart D thereof, are applicable to main telephones, PBX and KT equipment. Each of hazardous voltages, longitudinal balance, signal power and leakage currents must remain within stipulated limits to prevent harm. In addition, "pre-trip" and "false trip" must be prevented, except as noted below, and proper operation of billing equipment must be assured. All of the above must occur within foreseeable environmental and electrical stresses to which equipment will be subjected during shipment, installation and use.

20. Improper network control signaling, as the Commission concluded in its First Report and Order, paragraph 22, does not generally require specific protection, except as it might relate to improper billing, since a failure of network control signaling will adversely affect the user's ability to generate telephone calls and receive telephone calls. The Commission chose, in the First Report and Order, to control one aspect of network control signaling—"pre-trip" and "false trip"—which is dependent upon limitations on on-hook impedance. This was done on the theory that an unknowing caller who attempted to place a telephone call to equipment which caused "pre-trip" or "false trip"

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[8] Customers who choose to use equipment not supplied by the telephone company assume the risk that this equipment will not perform adequately. Presumably, suppliers of inadequate equipment will not remain in the market for very long. The Rules in Part 68, however, assure that in failing to operate properly, even inadequate equipment will not harm the telephone network.

would perceive the call as one which failed to go through, and would be expected to continue to attempt to place the call, or involve telephone company maintenance personnel. The rationale for controlling on-hook impedance is equally applicable to main telephones and key telephone systems, as "pre-trip" and "false trip" have been controlled in the past, where such customer-provided equipment, used for both residential and business applications, was connected through carrier-provided connecting arrangements.

21. However, PBXs are only used for business applications, and a failure having the effect of "pre-trip" or "false trip" would render the PBX unable to answer incoming telephone calls. Such a failure would go far beyond inconvenience to the user; it would adversely affect his business. Consequently, such business users would be strongly motivated to both acquire equipment which did not have this effect, and to have offending equipment immediately repaired or replaced. Moreover, since the release of our First Report and Order, we have received no comments which indicate that incompatible PBX on-hook impedance will even cause "pre-trip" or "false trip," and we therefore must conclude that these effects will not occur. Accordingly, we will not impose on-hook impedance limitations, in Section 68.312, on PBX equipment. We view this as a problem of compatibility of terminal equipment with telephone facilities, and again encourage the telephone companies to provide equipment manufacturers with design specifications to which equipment can be designed.[9]

22. The great majority of ancillary and data equipment which is presently within the scope of Part 68 is connected to loop-start telephone facilities, whereas PBX equipment, depending upon the central office facilities of the serving telephone company, may be configured either for loop-start or ground-start operation. A loop-start trunk or line uses network control signaling which is compatible with a telephone set, while a ground-start trunk uses the intentional connection with earth ground of one trunk wire at the central office to indicate the start and end of a call, and the indirect connection of one trunk wire with earth ground at the PBX to sense this central office-end connection with earth ground (through PBX circuitry) as well as the direct connection of one trunk wire with earth ground at the PBX to indicate the start of an outgoing call. All of these intentional connections with earth ground are timed so that balance is maintained on the trunk when voiceband energy is present on the trunk in order that crosstalk does not result when the connections with earth ground are present. As a consequence of Bell's January 22 and March 1 filings in this proceeding, and of the comments thereon, many Part 68 requirements have been modified to accommodate the intentional connections with earth ground that occur on ground-start facilities. Thus, most of the technical concerns which were expressed in the comments which

[9] Section 68.110 imposes a requirement that telephone companies supply such information upon request for particular telephone facilities; general design specifications, in the nature of "Technical References" which have been supplied in the past, would effect compliance with this rule if sufficiently comprehensive. We would note that complex compatibility problems in connection of customer-provided PBXs have been handled in the past through "Technical Reference" specifications and not hardware protection, e.g., incoming call timing protocols, outgoing call timing protocols and disconnect sequences. *See* "Technical References": PUB 42401, March 1974, *Voice Connecting Arrangement CDH*, pp. 3-4, 8; PUB 42402, March 1974, *Voice Connecting Arrangements CD7, CD8 and CD9*, pp. 3-4, 8.

we received on including PBX equipment have already been alleviated.[10] In this order, therefore, we shall only deal with those problems which remain, in light of the changed requirements of Part 68 as presently written.

23. *Longitudinal Surges.* Section 68.302(e) requires conformance to the technical standards of Part 68 after the application of surges with respect to earth ground. Since equipment intended for use on ground-start facilities will normally have circuitry which is intentionally connected with earth ground, the effect of this requirement might be to destroy such circuitry during testing. As in the case of our other environmental conditioning requirements, our rules provide that if such is the case, the equipment is still required to conform to the limitations of Sections 68.304-68.314, although it may be inoperative.

24. *Longitudinal Balance Limitations.* Section 68.310(d) requires that registered one-port terminal equipment present 40 dB of balance in the 200-4000 Hertz band in the off-hook state, when used with ground-start facilities. This recognizes that in the on-hook, or quiescent state, there is an intentional connection with earth ground which would cause the balance parameter to fall below 40 dB. Section 68.310(e) establishes balance requirements for registered protective circuitry used with loop-start facilities, but there is presently no concomitant standard for registered protective circuitry used with ground-start facilities. Accordingly, we shall adopt a new Section 68.310(f) which follows the language of Section 68.310(e), but which imposes the limitation presently applicable to Section 68.310(d).

25. *On-hook Impedance Limitations.* In accordance with our discussion in paragraphs 21 and 22 above, the introduction to subsection (a) will be modified to state "Limitations on individual equipment intended for parallel operation on loop-start telephone facilities, other than PBX equipment."

26. *Means of Connection.* We have received comments which indicate that plugs and jacks may not be appropriate for connection of PBX and key telephone equipment to the telephone network in view of the multiplicity of connections which would be involved. As was the case in our First Report and Order, we view this as a problem which appropriately should be addressed, in the first instance, by the parties who will be performing installation of such equipment. Accordingly, we will institute cooperative meetings between carriers and equipment manufacturers and installers, by a Public Notice to be released in the future, which will address suitable means of connection of PBX and key telephone equipment to the telephone network. We reserve the right to prescribe the use of plugs and jacks, or other suitable means of connection, in the event that such cooperative meetings are not fruitful.

27. *PBX and KT Installation Problems.* Unlike ancillary and data equipment and telephone sets, which are generally connected only to the telephone network and to no other equipment, PBX and KT systems consist of common equipment which is directly connected to the

[10] Parties had indicated that the leakage current, longitudinal balance, on-hook impedance and hazardous voltage limitations would have to be changed to accommodate PBX trunks. In addition, concern was expressed that the signal power limitations, rigidly applied, would require additional components in telephone sets used with PBXs, unnecessarily.

telephone network, and remote terminal equipment (such as telephone sets) which is indirectly connected to the telephone network through the common equipment. If protective circuitry is employed at the point of connection with the telephone network, then no harm can result from improper installation of wiring between the common equipment and remote equipment. However, if protective circuitry is not connected between such intra-system wiring and the common equipment, and there is no protective circuitry at the point of connection to the telephone network, then the network is vulnerable to inadequate intra-system wiring, and improper installation of such wiring.

28. Wiring is passive. It cannot, of itself, generate any signals. It can, however, become connected with earth ground or power lines through inadequate insulation, or marginally adequate insulation and improper installation. We have received no adequate proposals for certifying the installation of wiring. Even if we were to make the leakage current requirements applicable to intra-system wiring (which would assure adequate insulation), there still would be no assurance of adequate separation from power lines at the time of installation of such adequately-insulated wiring. Thus, we are faced with a quandary; the common equipment may be perfectly acceptable without protective circuitry, and yet leave the telephone network vulnerable to the vagaries of installation of wiring connected with the common equipment.

29. We have not received adequate recommendations for appropriately addressing this problem in the scope of the F.C.C. registration program. Therefore, we are requiring that (1) PBX and KT equipment be connected to the telephone network through protective circuitry at the point of connection with the telephone network which assures compliance with the hazardous voltage, longitudinal balance and leakage current requirements regardless of the design and installation of the common equipment and intra-system wiring (in which case, no further information concerning the design of the common equipment need be furnished, except as noted below); or (2) that such protective circuitry be located within the common equipment such that it is electrically in the path of all wiring between the common equipment and remotely-located equipment (such as telephones),[11] or (3) PBX and KT equipment be connected to the telephone network through *fully* protective circuitry at the point of connection with the telephone network (in which case, there would be no limitation on the remote terminal equipment which might be connected through the intra-system wiring, except possibly for data equipment). In each of the first two alternatives (1) the common equipment may only be used with remotely located terminal equipment which itself is registered as conforming with the signal power requirements of Part 68, or which is connected to the remote end of the intra-system wiring through registered protective circuitry, and (2) information would have to be furnished concerning the loop current furnished remote equipment, to determine whether equipment registered as conforming to the signal power requirements when connected to a loop simulator circuit would similarly conform to these requirements as connected with the loop currents furnished by the common equipment. Since the Bell-initiated revised signal power

[11] Many PBX designs already incorporate such circuitry as is called for under options (1) and (2), e.g., "repeat coil" PBXs.

limitations do not control in-band power for live voice acousto-electrical transducers (such as telephone sets), this approach will require no additional power limiting components to be added to PBXs if used only with remotely located telephone instruments.[12]

Conclusions

30. After reviewing the various arguments cited herein, we are of the view that no valid legal or technical basis has been advanced which would support the continued exclusion of main telephones, PBX and KT equipment from the scope of Part 68 of the FCC Rules. Such equipment has been connected to the telephone network since *Carterfone*, through connecting arrangements (telephone company-provided protective circuits), and Part 68 of the FCC Rules provides substantially equivalent assurance of nonharmful connection without the telephone company-provided connecting arrangements. Additionally, all of the conclusions of paragraph 16 of the First Report and Order are applicable to main telephones, PBX and KT equipment, and therefore the present requirement of connecting such equipment solely through telephone company-provided connecting arrangements is unlawfully restrictive of the customer's right to use the telephone network in a manner which is privately beneficial without being publicly harmful. Moreover, the present requirement of connecting such equipment solely through telephone company-provided connecting arrangements is unlawfully discriminatory for the reasons stated in paragraph 16 of the First Report and Order.

31. In addition, a registration program applicable to some equipment types, but not applicable to other equipment types, would appear to raise serious questions of discrimination between those subscribers who wish to connect harmless equipment within the scope of the registration program, and those subscribers who would wish to connect harmless equipment not included within the scope of the program. The technical discrimination between equipment types is also serious. Anomalously, equipment which is presently within the scope of Part 68 (e.g., datasets, which are typically connected with commercial power sources) actually may present a higher potential for harm than does equipment which is presently excluded (e.g., main telephones, which are connected with no power sources other than the telephone network itself). Such discrimination can simply not be sustained on technical "harm" grounds. Further, this discrimination becomes totally unsustainable in the case of main telephones (presently excluded) which are the same instruments as extension telephones (presently included).

32. The Part 68 technical requirements are applicable to main telephones, without modification, and to key telephone and PBX equipment, as modified herein. Main telephones, key telephone and PBX equipment which is registered in accordance with Part 68, or which is connected to the telephone network through protective circuitry registered in accordance with Part 68 will be privately beneficial without being publicly harmful. The requirements of Part 68 as modified herein will provide the requisite assurance of non-harmful connection of such equipment.

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[12] We encourage submission of proposed rule changes which would assure proper installation of intra-system wiring and thereby preclude any unnecessary use of protective circuitry.

33. Main telephones, and PBX and key telephone equipment used in conjunction with the appropriate F.C.C. registered protective circuitry, and F.C.C. registered main telephones, and PBX and key telephone equipment may, following the effective date of this Order, be connected directly with the telephone network pursuant to the procedures set forth in the Part 68 rules, without benefit of carrier-supplied connecting arrangements. Carriers may continue to provide such connecting arrangements, if registered, and may require their use for equipment not registered with the F.C.C. or not used in conjunction with appropriate F.C.C. registered protective circuitry. Except as herein provided, carriers may not require the use of such connecting arrangements or other interface devices or arrangements for F.C.C. registered equipment or protective circuitry, and may not impose other tariff conditions contrary to the *Carterfone* policy without prior approval of the Commission.

Order

34. IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, 208, 215, 218, 313, 403, 404, 410 and 602 of the Communications Act, That Part 68 of the Commission's Rules and Regulations is amended as shown in the appendix hereto, effective May 1, 1976.

35. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

The Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) are amended as follows:

Section 68.2 is amended as follows:

Section 68.2 *Scope*

(a) Except as provided for in paragraphs (b) and (c), the rules and regulations in this Part apply to the direct connection after May 1, 1976 of all terminal equipment other than coin telephones, and PBX and key telephone equipment to the telephone network, for use in conjunction with all services other than party line service, and to the direct connection after August 1, 1976 of all terminal equipment other than coin telephones to the telephone network, for use in conjunction with all services other than party line service.

(b) Unless otherwise ordered by the Commission, all items of equipment, other than PBX and key telephone equipment, of a type directly connected to the network as of May 1, 1976 may be connected thereafter up to January 1, 1977—and may remain connected for life—without registration, unless subsequently modified.

(c) Unless otherwise ordered by the Commission, all PBX and key telephone equipment of a type directly connected to the network as of August 1, 1976 may be connected thereafter up to January 1, 1977—and may remain connected for life—without registration, unless subsequently modified.

Section 68.310 is amended as follows:

Section 68.310 *Longitudinal Balance Limitations*

(a) *Technical Description and Application.* The metallic-to-longitudinal balance coefficient, $BALANCE_{m-l}$, is expressed as:

$$BALANCE_{m-l} = 20 \log_{10} \left| \frac{e_M}{e_L} \right|$$

where e_L is the longitudinal voltage produced across a 500-ohm longitudinal termination and e_M is the metallic voltage across the tip-ring interface of the input port when a voltage (at any frequency $200 < f < 4000$ Hertz) is applied from a balanced 600-ohm

metallic source. The source voltage should be set such that e_M = 0.775 volts rms (0 dBm) when a 600-ohm termination is substituted for the terminal equipment. The minimum balance coefficient shall be equalled or exceeded at all values of dc loop current that the port under test of the registered equipment is capable of drawing when attached to the loop simulator circuit specified in these Rules. A test circuit that satisfies the above conditions and may be used for measuring the metallic-to-longitudinal balance coefficient is shown in Figure 68.310(a). The minimum balance requirements specified below shall be equalled or exceeded under all reasonable conditions of the application of earth ground to the registered equipment:

Sub-paragraph	Equipment state	Minimum balance requirement	Frequency range (Hertz)
(b)	Both on-hook and off-hook.	60 dB 40 dB	200 to 1000 1000 to 4000
(c)	on-hook	60 dB 40 dB	200 to 1000 1000 to 4000
	off-hook	40 dB	200 to 4000
(d)	off-hook	40 dB	200 to 4000
(e) voice equipment	Both on-hook and off-hook	60 dB 40 dB	200 to 1000 1000 to 4000
(e) data equipment	on-hook	60 dB 40 dB	200 to 1000 1000 to 4000
	off-hook	40 dB	200 to 4000
(f)	off-hook	40 dB	200 to 4000
(g)	Both on-hook and off-hook	60 dB 40 dB	200 to 1000 1000 to 4000
(h)	off-hook	40 dB	200 to 4000

* * * * * * *

(f) *Registered Protective Circuitry for Ground-Start Applications.* These criteria shall be met with either terminal of the interface to other equipment connected to earth ground. The interface to other equipment shall be terminated in an impedance which will be reflected to the telephone connection as 600-ohms in the off-hook state of the registered protective circuit. Figure 68.310(e) shows the interface of the protective circuitry being tested and the required arrangement at the interface to other equipment.

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Section 68.312(a) is amended as follows:

Section 68.312 *On-hook Impedance Limitations*

(a) Limitations on individual equipment intended for parallel operation on loop-start telephone facilities, other than PBX equipment:

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Docket No. 19528 (PBX Interconnection)

We should not be extending the registration requirement to PBX equipment without first having examined the social and economic im-

pact of this decision. I expressed similar views in *Mebane Home Telephone Company*, 53 FCC 2d 473, 484 (1975) (dissenting opinion), and in my separate statement concurring in the *First Report and Order* in this Docket, 56 FCC 2d 593, 622 (1975). I see a clear difference between PBX and "data and ancillary devices," as the latter term was used in the *First Report and Order*. Answering systems, computers and their associated terminal equipment are not the traditional service offerings of telephone companies, although admittedly they may be closely related, functionally and in design, to more familiar apparatus. "Data and ancillary devices" are new conceptions, which generally do not offer—except, perhaps, for extension telephones—direct competition with the long-standing service offerings of telephone companies. Given a policy judgment that free competition in data and ancillary services will promote the public interest, the registration requirement established in the *First Report and Order* provides one method of safeguarding the switched network from technical harm, although more effective methods may certainly exist.

But how does one distinguish between newfangled terminal equipment and, for example, an extension telephone or any other traditional telephone equipment? The short answer is that one cannot distinguish on technical basis alone. Despite an apparent intuitive distinction between old-fashioned devices like extension telephones and modern-day exotica like an IBM 370/168, there are, technically, very few apparent grounds for making any distinction. Accordingly, in the *First Report and Order*, we applied the registration requirement to all equipment connected to subscriber loops, including extension telephones. I was dubious about taking this decision until our studies on the economic impact of interconnection were completed;[1] but I also recognized that the boundary between extension telephones, on the one hand, and innovative terminal equipment on the other was difficult and should be addressed more fully in another context. In light of this practical difficulty, I concurred in the *First Report and Order*.

But today we take a further step, in which the practical distinctions that dogged the *First Report and Order* do not appear. Most PBX equipment is not connected to ordinary customer loops. It is connected directly to carrier trunks. Hence, it can be distinguished, at least technically, from both extension telephones and data and/or ancillary terminal gear. While the *First Report and Order* could be justified as further opening the door to growth in new and innovative communications services by creating comprehensive rules for terminal interconnection, today's decision cannot be explained on that ground. Although it may lead to rearrangements of existing network facilities, and correlatively of existing rate structures, the application of the registration

[1] In my dissent in *Mebane, supra*, I cited some of the initial comments in Docket No. 20003. More comments having been filed, it becomes obvious that reconciliation of the various self-interested studies, the methodologies and conclusions therein, will be impossible; so acute are the divergencies. Even the Commission, which is all but irreversibly down the road with its policies (this instant action being merely the latest manifestation) cannot be said to be wholly neutral on the outcome of Docket 20003. Accordingly, because the social and economic issues loom so large with respect to our communications system, I doubt that I or the public can be satisfied with anything but an independent analysis of the issues by a disinterested, qualified observer, *e.g.*, a "think tank" which is not financially or ideologically tethered to the views of the participating parties. It is not a question of not trusting the analysis of the present protagonists, private or governmental. But, where I come from we have an expression: "Trust your sister—but cut the cards."

requirement to PBX seems less likely to produce new innovation and growth in the short run, and probably would have an immediate detrimental impact on the cost and availability of telephone service to the public. At least from our present situation of limited and incomplete information on the general economic effects of our interconnect policies on the efficiencies of operating a telephone company, the risk of such detrimental impact is unacceptably great in the context of the present case, considering the relative costs and benefits.

I must emphasize that the Commission, if it followed my counsel of caution on this matter, would in no way be acting to the prejudice of any future action it might wish to take. I do not suggest that it would never be appropriate to do what the majority does today; I only say that it would make more sense to keep our options open.

One further point requires mentioning. In my separate statement concurring in the *First Report and Order*, I said that I doubted the efficiency and good sense of applying the registration program to carrier-supplied equipment. Carriers have no reason to design equipment which will snarl the switched network, and every reason not to. My views on this matter have not changed; this application of the registration program still does not make sense.

For the foregoing reasons, therefore, I respectfully dissent.

APPENDIX H

***In re Primary Instrument Concept*, 68 F.C.C. 2d 1157 (1978)**
(Appendix, 68 F.C.C. 2d 1178-91, omitted)

Anti-Trust
Common Carrier, Interconnection, Customer-Provided Equipment
Common Carrier, Service, Discrimination In
Telephone Company, Customer-Provided Equipment

Proposed Primary Instrument Concept (PIC) which would require subscribers to a single tel. line to lease one instrument from the tel. co. rejected. Rulemaking not instituted. PIC violates Sec. 201(b) and 202(a). It unreasonably discriminates among users and is contrary to the Registration Program. Proposal violates precedent, is not justified, and raises antitrust issues. (CC 78-36)

F.C.C. 78-510

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Implications of the Telephone Industry's Primary Instrument Concept	CC Docket No. 78-36

REPORT AND ORDER

(Adopted: July 13, 1978; Released: August 2, 1978)

BY THE COMMISSION:

1. By Notice of Inquiry released on February 6, 1978 (FCC 78-67; 43 F.R. 6151) the Commission instituted this proceeding to explore the telephone industry's Primary Instrument Concept (PIC) which proposes that each single line subscriber to basic telephone service should be required to lease one telephone set from the telephone company. Comments and reply comments have been received from the telephone industry and various other interested persons. The formal comments are summarized in the appendix hereto, and the principal contentions of the parties are treated in the discussion below. We have also received and considered a number of informal comments by interested persons, and these submissions have been associated with the record.

2. The telephone industry[1] and National Telephone Cooperative Association (NTCA) have requested that we hear oral argument in this matter. American Satellite Corporation has filed in opposition, and the Computer and Business Equipment Manufacturers Association (CBEMA) has indicated its view that the need for oral argument is less strong than in other complex proceedings. Upon consideration of these requests and the record as a whole, we have decided not to entertain oral argument. The comments and reply comments of the telephone industry and NTCA seem to fully set forth their positions in support of PIC and the asserted social objectives. Contrary to the

[1] Filing jointly are: the Organization for the Protection and Advancement of Small Telephone Companies, the United States Independent Telephone Association, American Telephone and Telegraph Company, Central Telephone & Utilities Corporation, Continental Telephone Corporation, GTE Service Corporation and United Telecommunications, Inc.

suggestion of the industry, we have experienced no difficulty in understanding the extensive discussion of the issues contained in the record, and we consider that record to be adequate for decision. It does not appear to us that oral argument would be sufficiently useful to warrant the delay necessarily entailed in this extra, discretionary procedure. Considering the unsettling effect of the pending unresolved proposal on the telephone and equipment supply industries and their customers, we conclude that an expeditious resolution of this matter is in the public interest.

3. The National Association of Regulatory Utility Commissioners (NARUC), with the support of various state commissions, has requested that we convene a Federal-State Joint Board to prepare a recommended decision in this proceeding. While recognizing the interest and concern of NARUC and state regulatory agencies regarding the PIC proposal, we feel that the issues addressed in the comments and the questions before us for decision are such that a Joint Board is not necessary and would not be particularly helpful. We note that this is an Inquiry, rather than a rulemaking proceeding like Docket No. 19528. Moreover, the central issue goes to whether PIC is consistent with established federal policies, a question that lies peculiarly within the competence of this Commission. Thus, we decline to convene a Federal-State Joint Board.

Summary

4. Upon careful consideration of the telephone industry showing in light of the entire record, we have concluded that PIC is fundamentally inconsistent with the principles of *Hush-a-Phone, Carterfone, Mebane* and the Registration Program.[2] The principal arguments advanced by the industry in support of PIC have already been considered and rejected in those decisions. Notwithstanding the industry's failure to demonstrate any significant changed circumstances, we have taken another look at the merits of its position. We again reject the industry's premise that a carrier instrument is an integral part of complete telephone service. We find no showing of public detriment such as might warrant a restriction on the single line subscriber's right to furnish his own primary instrument within the *Carterfone* principle. The telephone industry has not established the validity of its principal contentions that single line subscribers would not adequately maintain their equipment, with resulting public harm, and that PIC is necessary for testing to effectuate telephone company responsibilities. The industry has not claimed any technical or economic harm, and its other asserted grounds either will not withstand analysis or are contrary to our previous findings. Being further of the view that PIC would be unlawful under Sections 201(b) and 202(a) of the Communications Act if initiated by a telephone carrier, we decline to institute rulemaking looking toward adoption of any such requirement.

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[2] *Hush-a-Phone Corp.* v. *U.S.*, 238 F.2d 266 (D.C. Cir. 1956); *Carterfone*, 13 FCC 2d 420, on reconsideration 14 FCC 2d 571 (1968); *AT&T on behalf of Mebane Home Telephone Company*, 53 FCC 2d 473 (1975), aff'd *Mebane Home Telephone Co.* v. *F.C.C.*, 535 F.2d 1324 (D.C. Cir. 1976); *First Report and Order in Docket No. 19528*, 56 FCC 2d 593 (1975), on reconsideration 57 FCC 2d 1216 (1976), 58 FCC 716 (1976) and 59 FCC 2d 83 (1976); *Second Report and Order in Docket No. 19528*, 58 FCC 2d 736 (1976), on reconsideration 61 FCC 2d 396 (1976) and 64 FCC 2d 1058 (1977), aff'd *sub nom. North Carolina Utilities Commission* v. *F.C.C.*, 552 F.2d 1036 (4th Cir. 1977), *cert. den.* —— U.S. ——, 46 LW 3219.

The Industry's PIC Proposal

5. As refined by its comments in this proceeding, the telephone industry is proposing that residential and business subscribers to single line telephone service be required to lease, as part of basic telephone service, one piece of customer-premises terminal equipment from the serving telephone company. This so-called "primary instrument" could be either a standard telephone or optional equipment of the serving carrier which has minimum capabilities equivalent to a standard instrument. The PIC requirement would not apply to private line, multiline, or data services. The industry defines "multi-line service" as multiple lines or trunks entering a single piece of common equipment which is so arranged that the selection of alternate paths to these lines is possible from connected terminal devices. According to the industry, "data service" is the connection of any registered device to the network that functions as a data modem, either via data jacks or standard voice jacks or by data access arrangements.

6. The charges for a standard instrument and its maintenance would be included in the charge for basic exchange telephone service. There would be additional charges for optional carrier equipment, with no refund or credit for not taking the standard instrument. The subscriber would be permitted to disconnect the carrier instrument and substitute his own equipment at all times except during telephone company testing. Though the customer need use the carrier's instrument only for testing, the full monthly lease charge for such primary instrument would remain applicable. Apart from the requirement that the subscriber lease and have available on his premises a carrier instrument for testing, the subscriber could obtain other terminal equipment from any source and use it any time except during testing.

7. The telephone industry bases its PIC proposal exclusively on the asserted social benefits to be realized by telephone subscribers. Thus, the industry expressly disclaims any reliance on economic or technical harm to the telephone network or the public, and has accordingly declined to submit any economic data in justification of PIC. The principal social benefits claimed are that PIC would allegedly provide a reasonable balance between maintenance of a regulated, quality telephone service and maximum customer choice in the selection of terminal equipment. More particularly, the industry states that PIC would facilitate carrier testing, serve as a reference set for the subscriber, encourage maintenance of terminal equipment, aid in prompt restoral of service, permit orderly introduction of technological innovations in the network, and facilitate transition under the Commission's Registration Program.

8. Another basic tenet of the industry position is its assumption that a standard telephone set supplied by the carrier is an essential, nonseverable element of complete telephone service. Because the service and the telephone are regarded as one, and since subscribers can otherwise use their own equipment except during testing, the industry considers PIC to be consistent with *Carterfone*. The complete service premise likewise forms one basis for the industry contention that PIC involves no unreasonable tying contrary to antitrust principles, there being no tying and tied products—only one complete service. Since the primary instrument is deemed to be an integral part of basic service,

the industry claims that PIC will not result in carrier domination of the terminal equipment market. Similarly, as one complete service is involved, the industry believes that the charge for the telephone set and its maintenance should be included in the monthly charge for exchange service. It opposes unbundling into separate charges for the service, terminal and maintenance components or affording subscribers the option of purchasing carrier sets. Indeed, under PIC, telephone sets purchased from a telephone company would not qualify as the primary instrument provided by the serving carrier.

Discussion

Background

9. The industry's PIC proposal must be considered in the perspective of antecedent interconnection decisions over the last several years. While we have repeatedly described this background in other contexts and in the Notice of Inquiry in this proceeding, we think it worthwhile to review briefly the landmark decisions once again.

10. For many years prior to 1968 the tariffs of the telephone companies prohibited the connection of customer terminal equipment to the telephone network. The first real break with this carrier imposed bar came in 1968 in the Commission's *Carterfone* decision which was premised on the broad principle laid down in *Hush-a-Phone* as to the "telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." *Carterfone* held that the prohibition against interconnection in the telephone company tariffs was unlawful under Sections 201(b) and 202(a) of the Communications Act because it indiscriminately barred the use of harmless as well as any harmful devices. Subsequently, in *Mebane* the Commission held that the broad principle of *Hush-a-Phone* and *Carterfone* extends to customer terminal equipment which may replace telephone system equipment.

11. Thus, since 1969 telephone subscribers have had the right to provide their own terminal equipment, including main station telephones. However, the post-*Carterfone* tariffs of the telephone companies initially permitted interconnection of such equipment to the network only through telephone company "connecting arrangements," allegedly required to protect the network from technical harm.[3] The comments of the telephone industry note that very few subscribers exercised the option to provide their own telephone sets under the post-*Carterfone* tariffs, in part due to the cost of the required connecting arrangement. Following lengthy rulemaking proceedings in Docket No. 19528, conducted with the assistance of a Federal-State Joint Board, the Commission concluded in 1975 that adequate network protection could be provided by means other than the required use of carrier-provided connecting arrangements. The same order established standards for protective circuitry for all terminal equipment and an FCC Registration Program to ensure compliance with such standards.[4]

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[3] See *AT&T Foreign Attachment Tariff Revisions*, 15 FCC 2d 605 (1968), on reconsideration 18 FCC 2d 871 (1969).

[4] *First Report and Order in Docket No. 19528*, 56 FCC 2d 593 (1975), on reconsideration 57 FCC 2d 1216 (1976), 58 FCC 716 (1976) and 59 FCC 2d 83 (1976).

Initially, this Registration Program was limited to data and ancillary devices, thus continuing the requirement for carrier connecting arrangements for customer-provided main stations and certain other equipment. After further proceedings the Commission in 1976 expanded the scope of the Registration Program to include main stations and other equipment items as well.[5] In the course of the latter decision the Commission considered and rejected a proposal by GTE Service Corporation that main stations should not be included in the registration program as "it is important that there be at least one telephone company-provided instrument on the customer's premise to assure compatibility with the telephone network and fulfill the telephone company's 'end-to-end' service responsibility" (*Second Report in Docket No. 19528*, 58 FCC 2d 736, 741). In rejecting the proposed requirement for a carrier-provided main station, the Commission stated (58 FCC 2d at 741-742):

> However, the telephone companies have provided connecting arrangements without an associated telephone instrument, and therefore must have themselves concluded that there is no such necessity. [Footnote omitted.] Second, in the First Report and Order, compatibility was distinguished from network harm (e.g., see paragraph 22, and Section 68.110(a) of the Rules). Third, the telephone companies do not even now have "end-to-end" responsibility where customer-provided equipment is used. They are only responsible for the service which they provide. When a customer chooses to use equipment not provided by the telephone company, the telephone company is only responsible for providing adequate communication line service. Obviously, the telephone company cannot be responsible for the performance of equipment which it does not provide, install and maintain.[a]

[a] Customers who choose to use equipment not supplied by the telephone company assume the risk that this equipment will not perform adequately. Presumably, suppliers of inadequate equipment will not remain in the market for very long. The Rules in Part 68, however, assure that in failing to operate properly, even inadequate equipment will not harm the telephone network.

12. The Commission's decisions in Docket No. 19528 were appealed to the United States Court of Appeals for the Fourth Circuit. Although the appellants included AT&T, the United States Independent Telephone Association, and other large independent telephone companies, GTE did not seek judicial review of the adverse ruling on its main station proposal. Pending judicial review, the effectiveness of portions of the Commission's orders, including the registration of main stations, was stayed by the Court. Following judicial affirmance of the Commission's actions, appellants sought Supreme Court review. On October 3, 1977 the Supreme Court denied certiorari,[6] and the FCC Registration Program for main stations and other equipment became effective shortly thereafter by operation of law with the issuance of the judicial mandate.

13. On October 3, 1977, on the same day that the Supreme Court denied certiorari, Congressmen Lionel Van Deerlin and Louis Frey, respectively the Chairman and ranking minority member of the House Subcommittee on Communications, forwarded for our attention the industry's PIC proposal to exempt primary instruments from the Reg-

[5] *Second Report and Order in Docket No. 19528*, 58 FCC 2d 736 (1976), on reconsideration 61 FCC 2d 396 and 64 FCC 2d 1058 (1977), *aff'd sub nom. North Carolina Utilities Commission v. F.C.C.*, 552 F.2d 1036 (4th Cir. 1977), cert. den., —— U.S. ——, 46 LW 3219.

[6] 46 LW 3219.

istration Program—a proposal akin to that just finally rejected in Docket No. 19528. Several parties to this proceeding argue that PIC and its supporting rationale have already been rejected in *Carterfone* and Docket No. 19528, and should not be belatedly reconsidered now. Indeed, CBEMA goes so far as to urge that *Carterfone* is *res adjudicata* and AT&T, as a party defendant, should be bound by the result.

14. Despite the timing of PIC, so close on the heels of a long controversy we thought was finally laid to rest, we decline to exercise our discretion to refuse to re-examine the matter at this juncture. *Hush-a-Phone, Carterfone* and Docket No. 19528 were only partly adjudicative of past disputes among the parties. More broadly, they involved important questions of public policy and interpretations of law with potentially far flung consequences for the general public, special user groups, and the interconnect and telephone industries. Questions of broad public policy are always subject to re-examination with evolving circumstances to assure that the interest of the public continues to be well served or that some important material factor has not been overlooked. Accordingly, we will take a fresh look at PIC to determine whether any new factors have been presented which may warrant a different public interest determination now. At the same time, with full appreciation of the sound reasons underlying the doctrine of finality, we will accord little, if any, weight to arguments identical to those we have previously rejected where there is no showing of changed circumstances or overlooked factors.

Consistency With Carterfone Principles

15. We discuss first the industry's argument that PIC is consistent with *Carterfone*. This argument rests on the twofold contention that (1) the telephone set is part of the telephone network as an inextricable element of complete telephone service; and (2) the customer rights upheld in the *Carterfone* line of cases concerned any additional equipment augmenting that network, a freedom not restricted by PIC.

16. *Hush-a-Phone* and *Carterfone* confirmed the existence of broad consumer rights under Sections 201(b) and 202(a) of the Communications Act. Rather than carving out any carrier "rights," these cases and the statute establish corresponding carrier *responsibilities*, by making unlawful any unjust or unreasonable interference with these consumer rights by the carrier. Every telephone customer has a protected right "reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental" (*Hush-a-Phone Corp.* v. *U.S.*, 238 F.2d 266). See also *Carterfone*, 13 FCC 2d 420, 423. Among the ways a customer can reasonably use telephone service is by supplying his own terminal equipment, including telephones, PBXs and key systems, provided only that he does not harm the telephone network or cause other public detriment. We expressly rejected in *Mebane* the argument that the customer's right to interconnect can be curtailed where the device he seeks to interconnect can be regarded as a substitution for telephone system equipment, stating (53 FCC 2d at 477–478):

> * * * we believe that here as in *Carterfone* it would be unjust, unreasonable and unlawful under Section 201(b) of the Act to restrict the customer's right to use beneficial interconnection devices that are not publicly detrimental, through a blanket prohibition against interconnection of devices that may involve some substitution of telephone company equipment. The determining factor should be whether there is harm to the telephone network, irrespective of whether the particular

interconnection device is one of the nature involved in *Carterfone* or a PBX or key system. To make a distinction based solely on whether there is a substitution of telephone company equipment, would be an arbitrary and unreasonable infringement of the subscriber's right in the absence of technical harm or other public detriment. A subscriber has a statutory right under Section 201(b) not to be subjected to tariff restrictions which indiscriminately bar interconnection of customer-provided equipment without regard to harm.

The judicially affirmed rationale in *Mebane*, while there specifically applied to PBXs and key systems, is equally applicable to telephone sets used as "main stations."

17. Nor do we see any other legal or rational basis for distinguishing the telephone set from all other terminal equipment and requiring that the customer obtain it from the telephone company. That the carriers have traditionally furnished the telephones with the service does not establish that they are required to do so, or warrant any inferences about the public interest.[7] While the definitions contained in Sections 3(a), (b) or (r) of the Communications Act are sufficiently broad to permit the inclusion of terminal equipment in interstate communication by wire or radio and in telephone exchange service, these definitions do not require that the provision of terminals be a common carrier service and they do not contain any distinction between telephone sets and other terminal equipment or between main stations and extension telephones. Nor does the Act contain any requirement that the carrier furnish a terminal of any kind as part of any communications service. Indeed, the carrier's duty under Section 201(a) is to furnish service "upon reasonable request"; nowhere in the Act does the carrier have any right to furnish service or equipment that the customer does not request or want. The Act is sufficiently broad to allow the Commission to permit a carrier to furnish a telephone set in conjunction with communications service where requested by the customer, subject to the statutory and regulatory requirements governing the furnishing of communications common carrier services. But to read into the Act any requirement for carrier terminal offerings as part of complete service is not justified by the statutory language, and would fly in the face of the *Carterfone* principle.

18. Further, we have not been shown any compelling practical reason why telephone service must be linked with a carrier supplied telephone set. There are significant distinctions between the basic utility service and the supply of terminal equipment. We are aware of no instance in recent history where any entity has sought to duplicate the local exchange lines and central office equipment of the telephone company. In contrast, there have been multiple suppliers of user terminal equipment, including telephone sets, since *Carterfone*. Indeed, the telephone industry concedes that the supply of terminal equipment is not a natural monopoly. Obviously, telephone service cannot be utilized, and in that sense is incomplete, without some kind of terminal equipment. It does not follow, however, that the service must be completed by a carrier-provided set rather than one obtained from an independent supplier. Other basic utility services, such as electricity and gas, are similarly incomplete until connected to some device such as a light bulb or gas furnace which is necessary to make the service

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[7] See *MCI Telecommunications Corp. v. F.C.C.*, 561 F.2d 365 (D.C. Cir., 1977), *cert. den.*, —— U.S. ——, 46 LW 3453 (1977).

useful. However, the customer need not purchase the light bulb or the furnace from the utility unless he chooses to do so.[*] The severability of telephone service from the telephone terminal is further reflected in the telephone industry's statement that there is no technical or economic distinction between a main station, sought to be carrier-supplied, and an extension telephone, which could be independently supplied under PIC. Either will suffice to make the customer's service complete. The industry comments make no claim that a carrier telephone set is necessarily superior to a customer set provided that the latter is properly maintained. If the telephone companies should cease supplying terminals altogether, the public could still receive complete telephone service through the use of terminals obtained from independent sources.

19. The contention that one telephone set is an integral part of basic service is essentially, in our view, merely another form of the oft-rejected argument that the telephone company must have complete end-to-end service responsibility. We expressly rejected this end-to-end responsibility argument in *Carterfone* (13 FCC 2d at 424) and again in the *Second Report in Docket No. 19528* (58 FCC 2d at 739-740). Indeed, if customers have the right to supply any and all of their own terminal equipment, as they have been permitted to do since the post-*Carterfone* tariffs in 1969, this necessarily means that the telephone company cannot have complete end-to-end service responsibility including terminals. Customer terminals lie outside of the carrier's areas of responsibility and are not an integral part of the carrier's service. PIC recognizes that a carrier terminal is not an integral part of service to multi-line, data, and private line subscribers and, for reasons discussed later, we find unconvincing the attempt to differentiate single line subscribers. We note also that the telephone companies do not have end-to-end responsibility in other instances apart from data and multi-line subscribers. Thus, as CBEMA points out, independent telephone companies, particularly those lacking a terminal manufacturing affiliate, presently may procure telephones from a variety of non-telephone company sources. Subscribers to basic telephone service may interconnect with private line facilities of independent carriers or private systems utilizing terminals and other equipment which is not the responsibility of the telephone company. In all international telephone calls the United States carriers are responsible for only half of the circuit and the remainder is provided by foreign entities over facilities and terminals outside the control and the responsibility of the United States telephone carriers, who also have no control over maintenance of such equipment. In short, the United States telephone carriers have long been accustomed to providing service for which they are only partially responsible. No justification or necessity has been shown for initiating an end-to-end responsibility only for domestic single line telephone service. Indeed, we note that the industry in its reply comments no longer bases PIC on any claim of end-to-end service responsibility. While this concession appears eminently reasonable

[*] Contrary to the suggestion of the telephone industry, we see no significant difference in this respect because gas and electricity are one-way utility services, whereas telephone service involves two-way communications.

in the circumstances, we think that the essentially equivalent argument that the carrier telephone terminal is an indispensable part of the carrier's complete telephone service must also fail.

20. Accordingly, we conclude that a telephone set supplied by the carrier is not an integral part of basic telephone service, and that PIC is not consistent with *Carterfone* by reason of any theory of complete service. The customer's right to provide his own terminal equipment, in the absence of a persuasive showing of overriding public detriment, prevails for telephone sets just as for any other kind of terminal equipment. In this connection we find entirely lacking in merit the industry's related suggestion that PIC is consistent with *Carterfone* because the subscriber could provide any other terminal equipment he chooses so long as he leases one carrier telephone set for testing. If that one required carrier telephone set is an infringement of *Carterfone* rights, it matters not that the customer's rights are not otherwise curtailed. Thus, the crux of the telephone industry's position, in our view, is the sufficiency of its attempted showing that PIC is necessary to avoid public detriment. Only on the basis of an adequate showing of this nature could PIC be regarded as consistent with *Carterfone.*

21. The telephone industry does not rest PIC on the kind of alleged public detriment which was considered in *Carterfone,* Docket No. 19528 and Docket No. 20003[9]—the alleged necessity of protecting the telephone network from technical harm or of avoiding higher rates for residential telephone service. The industry states that it is not attempting to justify PIC on technical or economic grounds and therefore has not answered the economic questions in the *Notice.* Since there is no other substantial showing of potential technical or economic harm in the record, our consideration of PIC will assume that no technical or economic harm would flow to the telephone network or the public from customer ownership of primary instruments. While customer equipment proceedings have historically involved assertions of technical or economic harm, the "public detriment" test of *Hush-a-Phone* and *Carterfone* and *Mebane* is broader than these specific types of alleged detriment. "Public detriment" encompases also any other kind of potential harm to the public which is sufficiently imminent and grave as to unavoidably require a curtailment of individual choice in order to protect the public at large. The telephone industry's showing of public harm must stand alone, as it is proper to bear in mind that customer owned telephone sets are not alleged to cause any technical or economic harm to the public.

22. The industry's assertion of public harm relies solely on the social benefits it claims would result from PIC. As the industry expresses it (Joint Comments, p. 3):

> The principal benefit is that PIC will provide a reasonable balance between maximum customer choice in the selection of terminal equipment and the maintenance of quality basic telephone service for single-line subscribers. PIC accomplishes this balance by providing a reasonable and logical distinction between regulated service responsibilities of the telephone companies and the competitive provision of terminal equipment.

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[9] In *Carterfone* we considered claims of technical and economic harm to the network. Docket No. 19528 was concerned exclusively with technical harm, and Docket No. 20003 dealt with economic harm. *First Report and Order in Docket No. 20003*, 61 FCC 2d 766 (1976).

The industry also phrases its position thus: (Joint Comments, p. 5):

> PIC provides a reasonable, recognizable, and easily understood method of separating public service responsibilities and accountabilities from those of competitive equipment supply, with a minimum of subscriber uncertainty and misunderstanding.

23. Leaving aside questions in the record as to whether there has actually been much regulation of carrier terminal equipment and maintenance,[10] we are not persuaded that PIC constitutes the only reasonable way to draw a line between regulated carrier responsibilities and competitive equipment supply. With no requirement for a carrier-provided primary instrument there is still a reasonable, easily recognized distinction between services and equipment furnished by the carrier, for which it is accountable to the customer and regulatory authorities, and any equipment provided by the customer for which the carrier has no responsibility. As we stated in the *Second Report in Docket No. 19528*, 58 FCC 2d at 741-742, carriers are only responsible for the service which they provide. When a customer uses his own equipment, the telephone company is "only responsible for providing adequate communication line service" and obviously "cannot be responsible for the performance of equipment which it does not provide, install and maintain." (*Id.*) Assuming the desirability of a clear line between the regulated and non-regulated activity, as well as between the carrier's responsibilities and those of the customer or independent equipment supplier, we think that an acceptable, logical line presently exists and that PIC is not necessary for this purpose.

24. In asserting the other principal social benefit, "maintenance of quality basic telephone service" or "continuity of service," the telephone industry points out that the ability to communicate with others depends on a properly functioning telephone—both yours and the other person's. As nearly as we can ascertain from the industry's comments, the only concrete substance to these generalities is the contention that PIC is necessary to encourage prompt repair and maintenance of telephone sets and to facilitate telephone company testing. As suggested by CBEMA, IBM, and Computer and Communications Industry Association (CCIA), this appears to be the heart of the telephone industry claim of public detriment. We will therefore examine the maintenance and testing showings particularly carefully to determine whether they make it necessary to restrict the customer's rights in order to protect the public at large from substantial harm.

25. As already noted, the telephone industry does not contend that the terminal equipment of independent suppliers is inferior to telephone company equipment if properly maintained. Rather the thrust of the industry position is that even if carrier and customer equipment is identical at the outset, single line residential and business subscribers would be less likely to maintain customer equipment to the degree allegedly essential for high quality telephone service and effective telephone company testing. Admitting that it cannot make any reliable

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[10] CBEMA asserts that the concept of telephone companies being fully accountable to state and federal regulation is without significance for terminals. It claims that the FCC Registration Program constitutes the first attempt at regulation, and that there has been no detailed regulation of installation and maintenance practices for terminal equipment. Moreover, it seems doubtful that there can be much effective regulation of charges for carrier terminal equipment and maintenance where these items are bundled into the charge for basic service.

estimates as to the number of single line customers who would be unwilling or unable to repair their equipment, the industry postulates that it is "human nature" to postpone repairs as long as possible. Moreover, the industry believes that PIC would provide incentives encouraging prompt repair because the cost of maintenance is included in the monthly service charge, so the customer need make no additional outlay for maintenance, and the telephone company replaces a malfunctioning set, so the customer need not do without the telephone during repairs.

26. It has not been established that telephone company maintenance of telephone sets generally consists of any more than repairing or replacing the instrument when trouble is reported by the subscriber. CBEMA has submitted evidence, to which we accord some weight, that Pacific Telephone and Telegraph Company has no program of inspecting individual telephone sets periodically to see if they need maintenance, though some central offices do automatically scan lines and terminal equipment to detect actual or potential causes of trouble.[11] Since that telephone company's maintenance of telephone sets basically consists of responding to trouble reports and repairing or replacing the telephone as necessary and given the customary uniformity of practices and procedures among the various Bell System companies, it may be inferred that the Bell System generally has no program of preventative maintenance for telephone sets. Moreover, since PIC contemplates that the customer would be required to plug in the carrier instrument only when he is aware that the telephone company is testing, automatic scanning by the central office when any terminal equipment is not in use falls outside the scope of PIC.

27. The argument that independent equipment supply is apt to result in inferior or dilatory maintenance has been rejected by this Commission and other regulatory authority. The New York Public Service Commission (NYPSC), a party to this proceeding,[12] has found that the same quality of service is likely to result from customer telephones. As CBEMA points out, the Bell System Quarterly Reports to this Commission tend to show that carrier equipment is not superior in performance to that of outside suppliers from the standpoint of trouble reports. Moreover, we have found in Docket Nos. 20003 and 19129 that equipment maintenance and reliability, rather than deteriorating, generally have improved in the competitive equipment marketplace. *First Report in Docket No. 20003*, 58 FCC 2d at 736, 742 n. 8P; *Final Decision and Order on Phase II of Docket No. 19129*, 64 FCC 2d 1, 26-27, 40-41 (1977). We also recognized in Docket No. 19528 that business subscribers have a strong incentive to avoid interruption in telephone service (*Second Report in Docket No. 19528*, 58 FCC 2d at 743). Assuming the validity of the telephone industry's assertions that multiline and data subscribers have a more substantial investment in termi-

[11] While it is our understanding that some telephone companies operating in unusually heavy moisture areas, such as Florida, test telephone sets periodically due to this special problem, we are not aware of any general practice of this nature.

[12] Though we granted NYPSC leave to make a late filing of its reply comments on or before June 2, 1978, such reply comments were not received until June 8, 1978, together with another motion for acceptance of late filing. Recognizing the particular concern of state commissions and the special experience of NYPSC, and since consideration of its submission will not delay our decision, we will accept the late filing.

nal equipment and are apt to maintain a closer relationship with equipment suppliers, it does not follow from these circumstances that the single line business subscriber is less likely to have a malfunctioning terminal repaired. The crucial factor, it seems to us, is how essential is the terminal to the conduct of the business. We think it is reasonable to assume that any businessman who relies substantially on the telephone in the conduct of his business, and this should include most businessmen, will have a strong incentive to have a malfunctioning telephone repaired promptly to minimize harm to his business. We see no compelling basis for concluding that the single line business subscriber and those who communicate with him need Commission enforced protection by the telephone company on this score.

28. In considering residential subscribers, the potential size of the customer terminal market, and the adequacy of customer maintenance, we must proceed without any hard data. The telephone industry has declined to submit any estimate as to the size of the customer market on the ground that this information is proprietary. As indicated, the industry also professes to be unable to make any reliable estimate as to the number who would be unwilling or unable to repair their equipment. Since this information does not appear elsewhere in the record, perhaps these questions are unavoidably speculative at this point. The telephone industry states that under the post-*Carterfone* tariffs only 0-.018% of all main stations were provided by subscribers. We note, however, that the Registration Program has been effective as to main stations since October, 1977. We assume that there has been no substantial flood toward customer ownership of main stations in the intervening months to May 1978 when reply comments were filed in this proceeding. For, if that had been the case, we are confident from past experience that the telephone industry would have called such a circumstance to our attention. Since the telephone industry has supported its position in terms of assumptions and presumptions, our consideration of this aspect must necessarily consist largely of assessing the reasonableness of those assumptions against others that could be made. As NYPSC correctly points out, there is no evidence before us that customer ownership of terminal equipment affects the quality of telephone service.

29. While it may be reasonable to assume that some residential subscribers would postpone repairs to malfunctioning telephone sets as long as possible, it seems equally reasonable to assume that many others would repair defective terminals promptly. In the absence of any estimate as to the percentage that might be delinquent, we think it likely that those who would repair promptly would far exceed those who might not. In the current circumstances subscribers who choose to furnish their own equipment in lieu of taking advantage of the available option of carrier equipment and maintenance by this very act demonstrate a particular interest in terminal equipment and a willingness to assume responsibility for caring for it. Indeed, NYPSC postulates that some customers will take "better care of equipment and be more cognizant of timely repairs because of the vested interest and pride of customer ownership." Moreover, the very fact that telephone service is practically universal tends to show the critical importance of this service to most residential subscribers. We cannot presume that there would be many residential subscribers who would long permit

any disruption or serious impediment to their telephone service due to faulty terminal equipment while continuing to pay the carrier for a service that the malfunctioning terminal has rendered useless or substantially impaired.

30. Moreover, many residential subscribers are accustomed to being responsible for the repair of their own equipment which is necessary to the effective use of other important services, such as the furnace, the refrigerator, the television set, etc. As NATA points out, there are a variety of arrangements whereby independent suppliers sell or lease terminal equipment, including warranties and service contracts. Where a supplier has no provision for maintenance, the subscriber can resort to independent repairmen. While the telephone industry claims a marked advantage in that it replaces the faulty telephone, there is no showing in the record that independent suppliers or repairmen would not, or could not upon sufficient subscriber demand, loan the subscriber a working telephone to use while his terminal is being repaired. This argument is largely inapplicable to subscribers who own more than one telephone. Any service problem with independent suppliers and repairmen would probably be self-correcting in time, as we recognized in Docket No. 19528 (*Second Report*, 58 FCC 2d 742, n. 8). For, if it became known in the community that adequate repair service was not readily available either from the equipment supplier or from other repairmen, presumably very few subscribers would exercise the option to supply their own equipment in lieu of an instrument maintained by the telephone company. We think that this presumption applies also to subscribers in rural areas if independent repair service proves to be relatively inaccessible, as the Rural Electrification Administration believes. The subscriber's freedom to go elsewhere for terminal equipment, like the freedom to compete, inevitably bears with it some risk of economic loss or lack of satisfaction. He should not be denied his freedom of choice for that reason.

31. In this connection, it is pertinent that we are not determining whether subscribers should be required to lease basic telephone equipment from the telephone company or *required* to furnish their own telephone sets. There is no question in this proceeding of restricting in any manner the subscribers' option to lease basic telephone sets from the telephone company should they choose to do so. Many of the telephone industry's arguments in support of PIC could turn out to be significant selling points in persuading customers to use telephone company equipment in lieu of providing their own, particularly if they are so located as to make the telephone company offer appear more advantageous or if the experience in their area with independent repair service is poor. Assuming that the telephone industry's equipment, maintenance and repair service are as superior as it suggests, it should have little difficulty in persuading most single line subscribers of the merits of its competitive case. In that event, the incidence of customer-provided equipment would probably be so insignificant as to cast doubt on the necessity for regulatory intervention. On the other hand, if the telephone industry cannot succeed competitively without regulatory coercion, because the equipment and repair service of independent suppliers and repairmen are superior or less costly or offer other advantages, then the answer surely is not regulatory coercion but protection of the consumers' option, and indeed right, to select

what they think most beneficial. The important point is that subscribers now have available, at their option, all the asserted benefits of PIC without being subject to any mandatory requirement.

32. Turning now to the central question of impact on the public, we recognize that the industry's concern is directed not only to the subscriber who furnishes his own telephone set but also to those who communicate with him. As the industry correctly points out, telephone communication is two-way and may be adversely affected by the malfunctioning telephone set of the other party. Accepting the possibility of such public impact, we question the magnitude of the problem and the appropriateness of PIC as a remedy. Apart from the lack of evidence in this record as to what percentage of subscribers supplying their own equipment would be negligent about repairs, we anticipate no widespread danger to the quality of the telephone service available to the public at large. While all telephone subscribers have the potential to communicate with all other subscribers, it is physically impossible, if only within the constraints of time, for any telephone subscriber to communicate with all or even a large percent of the 60 million or so other subscribers. The more likely situation would seem to be that an ordinary telephone subscriber might, with varying frequency, communicate with a relatively small number of relatives, friends, business and other organizations, and perhaps receive a few unsolicited telephone calls. Relatives, friends and business or organizational acquaintances are in a position to exert considerable pressure on the owner of the problem telephone to have it repaired, if they feel that the technical quality of communication with him is unsatisfactory.

33. At the same time, we cannot discount the possibility that while individual maintenance problems would probably have small spheres of public influence, the cumulative effect of a number of such problems could be more substantial—though probably not of a magnitude such as to have any significant impact on the nation's telephone service. Fully recognizing the possibility of some public detriment, we are nevertheless of the view that PIC is not an appropriate means of protecting the public. If AT&T or any other telephone carrier were to initiate a PIC requirement, we would be obliged to find the requirement unlawful under Sections 201(b) and 202(a) of the Communications Act. For here, as in *Carterfone* and *Mebane*, what is entailed is an indiscriminate proscription of customer provided main stations without regard to whether the telephone subscriber would maintain his equipment properly or not. In the interest of protecting the public from the few who might not adequately maintain their telephones, PIC would infringe upon the rights of all those who would repair promptly and sufficiently and cause no detriment whatever to the public. We could not find it in the public interest or lawful to adopt a requirement which the telephone industry could not lawfully initiate, particularly since we have not been shown that there is no other remedy that could be targeted more precisely against those causing any problem. [13]

34. We consider next the telephone industry's claim that PIC is necessary for testing. The industry states that at least 12% of all telephones experience trouble each year, 40% of the station troubles

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[13] For example, the telephone company might alternatively tariff a provision to the effect that service to any subscriber whose terminal equipment is maintained in such poor condition as to adversely affect the service of others will be suspended until the offending equipment is repaired. This would probably require a minor change in Section 68.3 of our Rules (definition of "harm").

involve components that may affect transmission and impair conversations, and 70-80% of trouble reports require a test of the line. There is no indication to the contrary in this record, and we will accept these statements *arguendo* for purposes of this proceeding. The industry further asserts that the single line subscriber must have on his premises, and pay monthly charges for, a telephone company instrument to enable the carrier to perform static and dynamic tests to ascertain whether any trouble is with the line or the telephone set. According to the industry, a subscriber set will not suffice for this purpose because it may not afford a recognizable line termination and, even if technically equivalent to a carrier instrument at the outset, may not have been properly maintained. The alternative testing measures suggested in the Notice (para. 10, D2.6) offer only partial solutions and might involve extra cost, the industry claims, whereas PIC would provide a complete answer to the testing problem.

35. It appears appropriate to clarify once again the extent of the telephone company's responsibility for testing in instances of subscriber terminal equipment. As we stressed in Docket No. 19528, telephone companies are "only responsible for the service which they provide" and in the case of customer terminals are "only responsible for providing adequate communication line service" (*Second Report in Docket No. 19528*, 58 FCC 2d at 741-742). Thus, the telephone company's testing responsibility is at an end when it determines that the line is functioning properly or it restores a defective line. The carrier has no responsibility for diagnosing what may be wrong with the customer's telephone set or how it may be causing transmission problems.

36. That being the case, we are inclined to agree with IBM's contention that the telephone company's testing responsibilities for ascertaining line-related problems generally do not require dynamic testing.[14] Accepting the telephone industry position that static testing requires a recognizable line termination, we are not persuaded that a known termination requires adoption of PIC. While PIC is one means of achieving a known termination, it seems unnecessarily broad to require the subscriber to pay monthly charges for, and house, a carrier telephone set which he may not otherwise use simply in order to afford a known termination in the event of testing, particularly since there are other ways of achieving a known termination which do not infringe consumer rights.

37. In the first place, Section 68.312 of the Rules limits the range of permissible on-hook impedance levels of ringers in registered equipment. We modified this section of the rules to accommodate AT&T's concern about standards compatible with static testing, in order to assure that the electrical characteristics of all ringers would be within standards acceptable to the telephone company, at least for certain static testing purposes. This, together with Section 68.106(a) of our Rules, should give the carriers access to specific information about the termination characteristics of customer telephone sets. As IBM asserts, there is little basis for assuming that ringers in customer tele-

[14] According to the telephone industry, "dynamic" testing is to evaluate the interaction of the telephone with the network to determine complete functioning service. Thus, the telephone company works with the subscriber to establish whether he can dial, receive ringing signals and converse satisfactorily. "Static" testing is a "snapshot" electrical measurement of the electrical characteristics of the pair of wires from the central office to the telephone set. Static testing, which requires a known line termination, is done while the telephone set is on the hook or in idle position.

phones would be less reliable over time than ringers in carrier sets, since the ringer is one of the most dependable of telephone components due to its passive electrical nature. North American Telephone Association (NATA) also states that references for testing purposes are as well known or knowable for customer sets as for carrier instruments, as shown by the experience of independent telephone companies who obtain telephones from diverse sources.

38. We see no intrinsic reason why a customer telephone set could not serve, or be made to serve, as well as a carrier set for testing purposes, though it may be more cumbersome for the carrier to ascertain the characteristics of a particular set in the absence of a uniform standard. Should the telephone carriers believe that uniform termination characteristics would be desirable or that additional uniform qualities are necessary for effective testing, we would readily entertain a petition for rulemaking to appropriately amend Part 68 of the Rules in these respects. Indeed, several other parties to this proceeding (CBEMA, IBM, Computer and Communications Industry Association, Telecommunications International Union, and American Petroleum Institute) have urged us to prescribe termination criteria and any additional qualities necessary for testing, so that independent equipment suppliers could provide a primary instrument which meets the specifications and all telephones—carrier and non-carrier—could participate effectively in testing. We consider this to be a much more reasonable approach than PIC to testing needs, if uniformity is in fact necessary.[15]

39. There appear to be other available means, aside from PIC, for determining whether trouble is in the line or the customer equipment. One means, suggested by IBM and made feasible by the increasing use of plugs and jacks, is for the subscriber to take his telephone set to a neighbor whose telephone line and set are in working order. If the subscriber's telephone works satisfactorily on his neighbor's line, he has reason to think that the problem is with his own line. Conversely, if the telephone gives problems on the neighbor's working line, the subscriber knows that he should seek repair service for his set. If still in doubt, he could borrow the neighbor's working telephone and try it on his own line. According to the telephone industry, 35% of single line customers had jacks at the end of 1977 and 85% will have jacks within seven years. Hence, this simple solution will become increasingly available.

40. Another possible method, where the telephone company is unable to tell through central office static tests whether the line is functioning satisfactorily, is to dispatch a telephone company repair truck with a carrier telephone set to the subscriber's premise and charge the subscriber for the house call. It is our understanding that some telephone companies already charge the subscriber where it is determined that the fault lies with the customer equipment and not with the line. A charge to the occasional subscriber who causes the expense would appear more reasonable than requiring all subscribers with their own terminal equipment to pay a monthly charge for a primary instrument

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[15] We would also be willing to explore other testing alternatives, including those suggested in the Notice (para. 10, D2.6) which the telephone industry concedes might afford a partial solution, or the series jack suggested by IBM.

whether or not trouble arises or it is even needed for diagnostic purposes. Moreover, while the telephone company's responsibility does not extend beyond the line in the case of customer terminals, there is nothing to preclude it from voluntarily offering a diagnostic service in its tariff, so that the subscriber could call on the carrier and compensate it for diagnostic service if necessary, and then have any non-carrier equipment at fault repaired by the supplier or independent repairman.[15a]

41. In short, we are not satisfied from this record that PIC is necessary for testing or that alternative means for assigning trouble to the line or the set have been sufficiently explored.

42. Mindful of the industry's admonition that testing is only one aspect of the claimed social benefits which should be considered all together, we turn to the remaining assertions that PIC would serve as a reference set, aid in an emergency restoral of service, facilitate technological innovation in the network, and ease transition under the Registration Program. We are aware of the usefulness of a working reference point in diagnosing equipment trouble, as Tele-Tron Company graphically depicts in its comments. However, the reference point need not necessarily be a carrier telephone set. As IBM has indicated, it could be a neighbor's line known to be in working order or a working line at a repair center.[15b] Or if a subscriber owns two telephones, and one works, he may be able to use that telephone as a reference set. A subscriber with only a single telephone might borrow the neighbor's working telephone to serve as a reference set. Or he could take advantage of, and pay for, any diagnostic service voluntarily offered in the telephone company tariff which might include a carrier instrument to serve as a reference set. Under the circumstances, we conclude that PIC is not essential to the achievement of a reference point, however useful a reference point may be.

43. The industry states that PIC would aid in emergency restoral of service because the telephone company would have total responsibility for restoring all components of the service and the lack of a carrier instrument with known characteristics would hamper dynamic testing if that were needed to restore service to the customer's premise. We are somewhat at a loss to see how this bare statement, with no examples or other amplification, adds much to the industry's testing argument. Many emergencies, due to storms for example, must involve disruptions in the company's lines which surely can be restored by the telephone company without dynamic testing of every customer line. Moreover, it is conceivable that the efforts of multiple repair entities added to those of the telephone company might facilitate a faster restoral of service than the telephone company could accomplish alone. If dynamic testing of individual subscriber lines is required for some emergencies, then the necessary uniform characteristics could be included in the petition for rulemaking we have invited.

[15a] As was suggested in the Notice, much automatic test equipment which could be used for these purposes is already in use in central offices for telephone company installers and repairmen. Such equipment could be made available for more general use on a compensatory basis.

[15b] It should be noted that most repair orders are initiated by customers who telephone the carrier's repair service. If the subscriber's telephone is not working, he has to seek out another telephone to place a service call. Thus, his neighbor may already be involved.

44. Concerning technological innovation in the network, it is our understanding from our long regulatory association with this industry, that in introducing technological innovations into the network the industry has consistently been constrained by the characteristics of its enormous existing plant, and any changes which have had the potential for rendering unusable existing terminal equipment have been phased-in very slowly. AT&T alone presently has an investment of about 100 billion dollars in plant, and the total industry plant includes some 90 million telephones. Rather than planning technological changes which would require sudden widespread changes in central offices, or render large numbers of existing terminals unusable at once, AT&T and other suppliers of telecommunications services and equipment go to considerable lengths in the design and use of new technology so as to be compatible with existing central office and subscriber plant, as well as to cause changes thereto gradually. The major innovations which the telephone companies state they have introduced—inductive loading of cable pairs, common battery telephone exchanges, direct distance dialing, automatic message accounting, the 500-type telephone instrument, use of fine gauge wire in distribution plant, and electronic switching within central offices—have had varying potentials for rendering existing terminal equipment obsolete. In most cases these innovations were introduced in such a manner that they could co-exist with existing plant, and after passage of time their efficiencies were increasingly made available through usage of the new plant. Indeed, of these listed innovations, only the development of the 500-type telephone instrument involved a basic change to terminal design itself, and the increased efficiencies of this design, as compared with predecessor ones, allowed its use not only on all circuits where the predecessor telephones could be used (and could continue to be used after the new instrument was introduced), but also on more "lossy" circuits where the older telephones could not be used. The basic 500-type terminal design, and its network-interface parameters, have remained unchanged since that telephone was introduced around 1950. Moreover, although the telephone network itself has seen dramatic technological changes over the ensuing 28 years, these changes have been introduced in a manner which retains the network's compatibility with the basic 500-type telephone design. We find it hard to conceive of a new technological change in the network which would require immediate replacement of the telephone companies' 90 million telephones, or that would somehow be compatible with the carriers' telephones and not those of independent suppliers (which use the same network-interface parameters for their designs as the basic 500-type telephone). However, if the industry were contemplating an innovation which would be expected to render customer sets useless, it need not refrain from introducing that technological change for that reason. Of course, the telephone industry should inform independent suppliers as soon as practicable [16] concerning the timing and nature of the impending

[16] In the *Notice* (at ¶55) we inadvertently referred to Section 68.106 of the Rules, whereas the proper reference should have been to Section 68.110(b). The latter section requires the telephone company to notify the customer when it is making changes that would affect the customer's equipment. Similar notice, in major trade publications for example, could appropriately be given to equipment manufacturers. This section in essence requires that customers be given the same opportunity to maintain their telephone service uninterrupted as those using carrier equipment, where a technological development is phased-in which will render existing equipment unusable.

change so that they could manufacture, and their customers could buy, new equipment which would be compatible. While owners of obsolete equipment may face the choice of buying new compatible equipment or of again leasing a telephone company instrument, this is a risk which the customer assumes when he decides to furnish his own equipment. Of course, even if the subscriber were bound by PIC, this would not give him any protection against possible obsolescence of any other terminal equipment which he owned.

45. Moreover, this aspect of innovation must be considered in the broader context of innovation generally. We have repeatedly found that the competitive equipment marketplace has stimulated innovation on the part of both independent suppliers and telephone companies, thereby affording the public a wider range of terminal choices and other benefits.[17] See, for example, *First Report in Docket No. 20003*, 61 FCC 2d at 867; *Final Decision and Order on Phase II in Docket No. 19129*, 64 FCC 2d 1, 26, 40-41 (1977); *First Report in Docket No. 19528*, 56 FCC 2d 503, 601-602. In Docket No. 19129 we found that while the Bell System entities have been innovative to a substantial extent, "such internal innovation has frequently been undertaken or spurred only by the stimulus of competition" (64 FCC 2d at 41). The very fact that the telephone instrument has remained basically unchanged over the past 28 years, while technology in communications, computers and competitive terminals has been rapidly advancing, indicates that the public might well benefit from some competitive stimulus to telephone terminal technology. Some parties, such as IBM, Computer and Communications Industry Association, and Independent Data Communications Manufacturers Association, predict that single line subscribers, the largest communications consumer market, are about to be the beneficiaries of a breakthrough that would bring into widespread use home and small business data terminals, digital telephones, and terminals combining voice and data functions. These and other parties voice concern that PIC might make the supply of such terminals the exclusive prerogative of the telephone industry, as it seems unlikely that many homes would have more than one home data terminal.[18] In view of the wholesome effects of competition on innovation, the benefits accruing to the public, and the potential for significant new developments in home and small business terminals, we deem it contrary to sound public policy to restrict a large segment of the home and business terminal market from any real competition by diverse suppliers. We believe that there will be no significant impediment to innovation by the telephone industry in the absence of PIC, and that the stimulus to innovation and other benefits likely to flow from competition in primary instruments are of overriding public importance.

46. Finally, concerning the industry's argument that PIC would ease the transition under the Registration Program, we note first that PIC is not intended as a temporary measure. The industry expects PIC to continue indefinitely though, like any other rule or policy, it would be

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[17] Innovation and other benefits to the public have included the availability of new equipment features, improved maintenance and reliability, improved installation features facilitating the making of changes, the options of owning or leasing, and competitive pricing and payment options. *First Report in Docket No. 20003*, 61 FCC 2d at 867.

[18] The parties also point out that home data terminals would probably be portable and connected through voice jacks, thus falling within PIC under the definitions of the present industry proposal.

subject to review and modification by the Commission after a reasonable period. Rather than being transitional, PIC would permanently carve out a very large exception to *Carterfone* and the Registration Program, and in this sense constitutes a belated attempt by the industry to seek reconsideration of our decision in Docket No. 19528 not to exempt main stations. Even if the telephone industry were seeking a bona fide transition period or a phase-in of main stations, no good cause has been shown for such relief. Though the Registration Program has been effective since October 1977 for main stations, we have had no significant complaints from the telephone industry, consumers or anyone else about concrete problems.[19] Thus, either consumers are taking advantage of the primary instrument option of the Registration Program so gradually as to afford a kind of transition period or the Registration Program is operating so smoothly, despite larger numbers, as to make a transition period unnecessary.

CONCLUSIONS AND ORDER

47. In sum, all of the social benefits claimed for PIC are now available at the subscriber's option without being forcefully imposed by the carriers or this Commission. Considering the telephone industry's asserted grounds for PIC, both individually and collectively, we find and conclude that there has been no showing of public detriment such as might warrant a mandatory requirement for a carrier instrument and interference with the consumer's present right to provide his own primary instrument if he chooses. Hence, PIC is patently inconsistent with *Hush-a-Phone*, *Carterfone*, and *Mebane* and, if initiated by a carrier, would be unjust, unreasonable and unlawful within the meaning of Section 201(b) of the Communications Act. We have already concluded that PIC would be unlawful within the meaning of Section 202(a) of the Act, if carrier initiated,[20] since it imposes a blanket prohibition against ownership of primary instruments by single line residential and business customers without distinguishing between those who would adequately maintain their own terminals and those who might not. The industry's failure to show that the bulk of single line business and residential subscribers would not adequately maintain their equipment also makes the proposed discrimination between these consumers and multi-line and data subscribers on maintenance grounds unreasonable and unlawful under Section 202(a). We would not adopt a proposal that would be unlawful if initiated by the carriers unless there were compelling public interest reasons for doing so. No such reasons have been established here.

48. Since PIC would also be contrary to the Registration Program, the industry seeks rulemaking to modify Part 68 of the Rules in this respect. We determined in Docket No. 19528 and elsewhere[21] that the public benefits from diversity in the supply of terminal equipment and that consumers for this further reason should have the option of furnishing their own terminals, including main stations. Among these benefits as found in Docket No. 20003 (61 FCC 2d at 867), are: the

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[19] Though some individual telephone companies have asserted a fear of economic repercussions, these have been in the nature of speculation or arguments on behalf of PIC rather than reports of actual instances of difficulties.

[20] See paragraphs 27-33 above.

[21] *First Report in Docket 19528*, 56 FCC 2d at 601-602; *Second Report in Docket No. 19528*, 58 FCC 2d at 740-741; *First Report in Docket No. 20003*, 61 FCC 2d at 867; *Final Decision on Phase II of Docket No. 19129*, 64 FCC 2d at 28, 40-41.

public's wider range of options as to terminal devices, competitive stimulus to innovation by telephone companies and independent suppliers, the availability of new equipment features, improved maintenance and reliability, improved installation features including ease of making changes, competitive sources of supply, the option of leasing or owning equipment, and competitive pricing and payment options. We considered and rejected the basic arguments of the telephone industry in support of PIC in those proceedings, concluding that they either lacked merit or were outweighed by the benefits of competitive supply. The industry has shown no new circumstances warranting any different conclusions or modification of our decisions in *Carterfone*, *Mebane*, and Docket No. 19528. We remain of the opinion that the proven and reasonably anticipated public benefits from the competitive supply of terminal equipment, including primary instruments, take precedence over the considerations urged by the telephone industry. If anything, this judgment is the more firm in light of potential developments in home and small business terminals and the heightened desirability of protecting the consumers' freedom of options in such circumstances. Accordingly, we decline to exercise our discretion to institute rulemaking looking toward the adoption of PIC.

49. Having determined that PIC is contrary to the principles of *Carterfone* and the Registration Program and that good cause has not been shown for initiating procedures to modify these principles, we believe it unnecessary to resolve other questions posed in the Notice.[22] Some comments nevertheless appear in order. CCIA particularly and to a lesser extent the Department of Justice have argued that PIC would be questionable under antitrust principles and precedents with respect to unlawful tying arrangements. Insofar as the telephone industry responds that there is only one "complete service," our rejection of this concept leaves the antitrust question without adequate answer. Thus, aside from *Carterfone* and our public interest judgment on communications grounds, PIC has antitrust uncertainties which would have to be more satisfactorily resolved before we could undertake to propose rulemaking.

50. PIC has other troublesome overtones. Of these we note only the contention of some parties that full and fair competition between carriers and independent suppliers of terminal equipment necessitates that local exchange rate structures be unbundled to provide separate charges for components such as exchange access, wiring, equipment and maintenance. Otherwise, they assert, customers do not have a fair choice, and may end up paying for equipment and maintenance which they do not receive.

51. In view of our disposition of PIC, we decline to explore such questions further in this proceeding. Moreover, we do not here have a sufficient factual record on which to base any decision. We therefore do not reach the telephone industry assertion that charges for carrier instruments used for both intrastate and interstate services, and such questions as credit allowances for customer-provided equipment and unbundling, lie totally outside of FCC jurisdiction and are exclusively the prerogative of state regulatory authorities.

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[22] The request of the Organization for Use of the Telephone, Inc. that we require telephone/hearing-aid compatibility can appropriately be pursued in the pending proceedings in CC Docket No. 78-50.

52. Accordingly, in light of all of the foregoing, IT IS ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

No. 82-2128

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

vs.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENTS' OPPOSITION

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No. 82-2128

IN THE

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October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Petitioners,

vs.

LITTON SYSTEMS, INC., *et al.*,

Respondents.

REPLY TO RESPONDENTS' OPPOSITION

Introduction

This case was tried and decided by the jury on Litton's claim that Bell drove Litton from the relevant markets by making public statements in opposition to a proposal fundamentally to change telephone service by ending exclusive carrier control over signalling functions essential to the operation of the telephone system. The Petition for Certiorari demonstrates that this case presents vitally important questions under the First Amendment and the *Noerr-Pennington* doctrine.

The most striking aspect of Litton's Opposition is that it ignores these First Amendment questions. Litton's counterstatement of the case does not even mention that the FCC initiated an industrywide rulemaking proceeding in 1972 and requested comments in 1973 on whether this "basic and substantial change" in the state-franchised telephone monopolies would be in the public interest. Pet. App. 176a. Instead, Litton baldly asserts (p. 2) that the monopoly over network control signalling equipment had been "illegal" since before 1956—which is to assume away the whole public debate. Litton does not even refer to the First Amendment until page 16 of its Opposition and then it is only to assert that "[t]his is not a First Amendment case."

Litton now claims (pp. 2-22) that its alleged injuries resulted solely from Bell's private decision in 1968 to file the PCA tariff that preserved carrier responsibility over network control signalling equipment, instead of adopting a carrier-administered system of standards for that equipment. Most of the substantive dis-

cussion in Litton's opposition (17-22) is devoted to an issue *not even raised* in the Petition: whether tariff *filings* are protected by *Noerr-Pennington.*

Litton's strategy is transparent and not surprising. It wants to insulate its $276 million judgment from further review. It believes that the only way to do so is now to portray the case as a routine antitrust case that presents no First Amendment issues.

This Reply is limited to establishing two points. First, this *is* a First Amendment case. Litton cannot now be permitted to walk away from the basis on which it obtained its $276 million judgment. Second, Litton seeks to defend its judgment by rewriting the regulations that existed at the time of its alleged injury and by ignoring First Amendment principles.

I. This *Is* A First Amendment Case To Which The *Noerr-Pennington* Doctrine Is Fully Applicable.

Litton admits that there is a conflict among the courts of appeals on the applicability of *Noerr-Pennington* even under its present theory of the case.[1] However, the more basic reason why this *is* a substantial First Amendment case is that it was tried by Litton and decided by the jury under Litton's theory that Bell's public opposition to certification in 1973 drove Litton from the relevant markets and violated the Sherman Act.

Litton's assertion that the judgment rests on the *filing* of the PCA tariff in 1968 flatly misstates the record. The filing of that tariff obviously could not have driven Litton from these markets. Bell's PCA tariffs went beyond any requirement of the then existing regulations by permitting customers, for the first time, to

[1]Litton's Opposition acknowledges (20 n.12, 27) that the Second Circuit's holding that *Noerr-Pennington* is inapplicable to advocacy in defense of privately-initiated conduct and in opposition to liberalized entry conflicts with the Fifth Circuit's decision in *Mid-Texas Communications System* v. *AT&T*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980), and with Judge Harold H. Greene's decision in *United States* v. *AT&T*, 524 F.2d 1336, 1361-64 (D.D.C. 1981). Litton correctly states (20 n.12) that there was no sham in *Mid-Texas;* the Fifth Circuit's holding thus rested on the threshold question of *Noerr's* applicability.

provide their own telephone instruments when connected through a carrier-supplied PCA that performed the critical network control signalling. Petn. 6-9. It is equally obvious that the only alternative that Bell could have adopted by tariff—a system in which *Bell* evaluated competitors' products under standards which *Bell* established—was wholly untenable both under the antitrust laws and from Litton's vantage point.[2] The filing of the tariff thus opened up the markets for Litton's entry in 1971, and Litton was very successful in 1972 and early 1973 *while the PCA was in effect.*[3] Indeed, both Litton's business plan and its damages evidence were premised on the basis *that the PCA requirement would remain in effect until 1973* and then be replaced by an FCC-administered system of standards. A1555-58, 1625, 6169, 6891.[4]

[2]This Court's holdings establish that such systems create more antitrust problems than they solve. See *Radiant Burners, Inc.* v. *Peoples Gas, Light, & Coke Co.*, 364 U.S. 656 (1961). As the Fourth Circuit held—in language Litton quotes out of context (p. 8)—such "carrier-initiated attestation procedures" are objectionable because they vest carriers with "private lawmaking authority over independent manufacturers." *North Carolina Utilities Comm.* v. *FCC*, 552 F.2d 1036, 1051 (4th Cir. 1977). Moreover, if Bell had adopted a carrier-administered system of standards between 1971 and 1974, it would have adopted the National Academy of Science's recommendation that it encompass the installation, maintenance, and manufacturing of equipment—as well as its design. That system would have been far more costly and intrusive than the PCA requirement, as Bell emphasized to the FCC. A13255-84.

[3]This fact, by itself, refutes Litton's claim (p. 3) that the PCA charges were prohibitive. Litton's assertion (p. 4) that all the other nationwide telephone instrument suppliers were driven from the market is also false. Many suppliers entered the market while the PCA was in effect, thrived in that market, and have remained in it continuously, see, *e.g.*, Tr. 7456-57, 12541-42, 12753, 16830-33, and some *favored* continuation of such hardware protection for the network. *Third Report and Order in Docket 19528*, 67 F.C.C. 2d 1255, 1268 (1978).

[4]The propriety of the finding that the initial filing of the PCA tariff violates the antitrust laws is logically part of any review of this case, however. But the question Bell has raised is *not* whether tariff filings are protected by *Noerr-Pennington*, as Litton erroneously claims (pp. 17-22). It is whether a finding on this issue can rest on the ground that Bell "should have known" in 1968 "that the establishment of stan-

(Footnote continued on next page.)

Under these circumstances, Litton's principal theory at trial was that it was Bell's public announcement of its opposition to certification in John deButt's speech in September, 1973, that drove Litton from the market. App. 21a, 31a. Litton's main witness at trial, its President Fred O'Green, testified that this speech was anticompetitive, that it would slow down or stop the pressure for FCC-administered certification, and that it was the principal cause of Litton's February, 1974, decision to leave this business. A1621-27, 1741-42. Litton's closing argument to the jury asserted that "this speech was taken very seriously throughout the industry and O'Green understood that *it probably would stop the pressure for certification.*" A6170-71 (emphasis added). Litton's claim, in short, was that Bell's advocacy drove it out of business because it influenced public opinion against certification.[5]

It is equally clear that the jury's damages verdict was predicated on its finding that Bell's opposition to certification violated the Sherman Act. The award was entered at a time when the jury had not even decided whether there was anything unlawful about the initial filing of the tariff in 1968. And the award was keyed to the six-year period from 1973 through 1978 when Bell's advocacy allegedly delayed PBX and key system certification—*not* to the eleven year period when the PCA tariff was in effect. Pet. 16-17.[6]

(Footnote continued from previous page.)

dards was a practical method" of protecting the network, when the PCA tariff not only was a reasonable attempt to comply with, but in fact complied with and went beyond, all existing state and federal regulatory requirements. Petn. 15-16, 27-28. Contrary to Litton's misstatement (p. 29), this claim was presented to the Second Circuit as well as to the trial court. See Brief For Defendants-Appellants in the Court of Appeals, pp. 9-25, 83-87.

[5]Indeed, Litton insisted at trial that its claim that Bell opposed certification in bad faith was entirely distinct from its challenge to the initial filing of the tariff. It thus asked that the two charges be submitted to the jury in *separate* interrogatories, and this request was granted. Tr. 13707-08.

[6]The additional fact that the jury did not increase the award—as it could have—when it belatedly found that the initial filing of the tariff was unlawful demonstrates that the jury found that *all* Litton's injuries flowed from the 1973 opposition to certification. App. 38a n.25.

Noerr-Pennington is therefore fully applicable even under Litton's theory of the doctrine. The judgment rests on a finding that Litton, in its words, was "driven out of business by something AT&T said" and that Litton's "injury flowed" from government inaction and delay that "resulted from [Bell's] efforts to influence" decisionmaking. Opp. 16, 20 n.12. Litton's reliance (27-28) on Judge Harold H. Greene's decision in *United States* v. *AT&T*, 524 F.Supp. 1336, 1361-64 (D.D.C. 1981), is mystifying. Judge Greene held on the same evidence that Bell's opposition to certification was protected by *Noerr-Pennington* and afforded no basis for antitrust liability.[7]

II. Bell's Opposition To Certification Could Not Be Condemned As A "Sham" Under This Court's Decisions And Those Of Other Courts Of Appeals.

In opposing certification, Bell stated opinions on matters of genuine public importance: the most cost-effective way to protect the network against risks of harm that *all* acknowledged to exist[8] and the effect of divided ownership of integral parts of the telephone network on its efficiency, on the quality of service, on future innovation, and on residential rates and other economic and social objectives. Numerous disinterested representatives of the public interest made parallel arguments and even found, after hearings, that the PCA was absolutely necessary. See Petn. 8-13. Indeed, the reason NARUC can categorically state, in its amicus brief, that Bell's advocacy was not a sham is that NARUC *led* the opposition to certification on these very grounds.

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[7]Judge Greene's further holding (see Opp. 28) that the First Amendment does not protect Bell's failure to *file* a tariff establishing a *Bell*-administered standards program demonstrates the point Litton made at trial: Bell's filing of its PCA tariff and its subsequent opposition to an *FCC*-administered certification program raise wholly separate legal issues. See n. 5, *supra*.

[8]See Petn. 25 n.16. Indeed, even Litton's Brief in the Second Circuit (p. 22) admitted that the unlimited interconnection of customer provided equipment risked cross-talk and other harms to the network. Thus, its repeated assertions (*e.g.*, 22-25) that there was no basis for Bell's concerns about network harm and that Bell somehow both misrepresented the facts and concealed the facts are incredible.

The Second Circuit's holding that this reasonable advocacy can be condemned as a sham will inevitably inhibit debate of public affairs, and it flatly conflicts with the standards applied by this Court and other courts of appeals. Petn. 22-27. It rests on two errors.

Erroneous Legal Standard. First, the court refused to assess the speech itself. Instead, it upheld the jury finding on the ground that there was a "version" of the evidence that converted the advocacy into a "sham" by treating statements of opinion as factual misrepresentations,[9] by drawing adverse inferences from irrelevant conduct,[10] and by outright revisionism of regulatory history.

Litton defends this approach. It asserts (Opp. 25) that the jury "had before it all the pertinent FCC decisions" and other evidence, and that it was for the jury to determine the meaning of the regulatory decisions, decide whether Bell's FCC pleadings violated the "mandate in *Carterfone*," or draw inferences that objectively reasonable positions were "baseless." It argues that the judicial role was properly limited to a determination whether Lit-

[9]The sole basis for Litton's claim (21-24) that Bell misrepresented facts to the FCC is Bell's disclosure and reliance on the "Hunt studies". But this was valuable speech, and Litton does not dispute that the Second Circuit's condemnation of it conflicts with the decisions of the Fifth, Seventh, Eighth, and District of Columbia circuits. See Petn. 24. Furthermore, because Bell's statement of opinion revealed all the "background facts" on which it was based, it could not have misled the FCC or anyone else and is absolutely privileged under any interpretation of the First Amendment. *Ollman v. Evans*, No. 79-2265, Slip. Op. at 21 (D.C. Cir. Aug. 5, 1983).

[10]Litton's Opposition illustrates these impermissible inferences. For example, it argues at one point (p. 25) that the minutes of a Tariff Review Group meeting held on July 11, 1968 (A7606-07)—which was only 2 weeks after *Carterfone* and 3½ months before the PCA tariff was filed—show that Bell "knew that standards were the best way to protect the network from harm" and that the PCA tariff was indefensible. But all the minutes say is that "current tariff efforts"—which had begun the previous year—are "not at all responsive to Carterfone." Quite apart from the fact that the statements did not refer to the PCA, the draft tariffs in issue were revised substantially before they were filed in late October 1968 and thereafter explicitly held by the FCC to *comply* with *Carterfone*. App. 166a-167a.

ton's "version" of the evidence supported the verdict, "giving it the benefit of all inferences which the evidence fairly supports, regardless of whether contrary inferences might be drawn." Opp. 23.

That is not the law. An unbroken line of decisions of this Court, which was referred to most recently in *Container Corp.* v. *Franchise Tax Board*, 51 U.S.L.W. 4987, 4991 n.13 (June 28, 1983), establish that there must be some independent judicial assessment of speech before it can be condemned. A rule that gave the jury such unbridled discretion to engage in post hoc condemnation of reasonable speech on public affairs is abhorrent to the First Amendment. Petn. 22 & nn. 14-15; *New York Times* v. *Sullivan*, 376 U.S. 254, 385-92 (1965).[11] Because the Second Circuit further allowed the jury to decide the meaning of the applicable regulatory decisions, the Second Circuit's approach violates both the principle that regulatory standards are questions of law for the court and the First Amendment. Petn. 25.

False Premise. The Second Circuit compounded its constitutional error by adopting the false premise that Bell's advocacy could be found to have violated the FCC's "mandate in *Carterfone*." App. 51a. Litton seeks to defend this false premise by rewriting the regulations that existed between 1971 and 1974.

Litton starts with the assertion (p. 2) that AT&T had two monopolies—a lawful monopoly over the telephone wires, cables, and switching machines and a second *illegal* monopoly over telephone terminal equipment. This is false. The franchised telephone monopolies were established and defined by state authorities, and continue unless and until preempted by federal authority. It is undisputed—and Litton stipulated to this fact (A4981-87)—that the state authorities uniformly have required telephone compa-

[11]Litton's sole reliance is on *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690 (1962). But when this Court considered the *Noerr-Pennington* issues there, the conduct was assessed independently to assure that it could be condemned without inhibiting public debate. 370 U.S. at 706-08. It was only when this Court reviewed the ordinary jury issues in the case that it applied the standard of viewing the trial evidence in the light most favorable to the prevailing party. 370 U.S. at 696.

nies to own and provide all telephone equipment needed to provide service within their franchised areas, including telephone instruments. See Petn. 4-5; App. 192a. There were at least *six* FCC decisions between 1968 and 1975 that made it explicit that the "mandate in *Carterfone*" did not redefine the state-franchised monopoly and that customers then had no more right to provide their own signalling units than to provide their own "loops, poles, or central office equipment"—"irrespective of whether [the signalling units] are harmless or harmful." Petn. 6-9; App. 166a-167a.[12] For example, the FCC's 1972 *Notice of Inquiry* in Docket 19528 (App. 176a) made it as clear as language can make it that telephone services "have been and are now offered only as complete services that include the offering of the telephone instrument," and that redefinition of the franchises to permit customer-provision of signalling equipment would constitute a "basic and substantial change" in telephone service. The FCC notices sought comments on the profound social, economic, and cost and quality of service issues that that proposal raised—as well as the question whether a standards program would adequately protect the network against harm. App. 176a-186a. Bell's advocacy discussed issues that had not yet been addressed, much less foreclosed.

It was not until 1976—after Litton left the relevant markets—that the FCC was able to resolve the economic and other issues, redefine the franchises to exclude network control signalling, and order that any contrary state laws were preempted.[13]

[12]Litton's reliance (4-5, 26) on the District of Columbia Circuit's opinion in *Hush-A-Phone* is erroneous; it establishes only that customer may *attach* "devices" (such as plastic cups) to *carrier-supplied* telephone instruments and thereby "use his telephone in ways that are privately beneficial without being publicly detrimental." *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266, 269 (D.C. Cir. 1956).

[13]The Petition demonstrates (12-13) that the FCC delayed its redefinition of the franchised monopolies until it could resolve the economic issues raised by the state commissions as well as by Bell. Litton responds by asserting: "*Fact:* The economic issues were settled in 1968 *Carterfone* decision" (Opp. 26, n.17). This will come as news to the FCC, which started a separate proceeding in 1974 (Docket 20003) to examine the economic issues arising from a certification program, stated to Congress in 1975 that it was essential that the economic issues be decided before it ruled on certification of PBXs and key systems, and issued a major opinion that addressed these economic issues in 1976. (Petn. 12-13).

Litton places extensive reliance (pp. 7-10, 25-26) on the FCC decisions issued between 1975 and 1978 that rejected the public interest concerns of Bell and the disinterested representatives of the public interest that advocated similar positions.[14] As Judge Greene recognized, the fact that these arguments ultimately were not completely successful is irrelevant; it would seriously inhibit public debate if advocacy is only protected when it succeeds. 524 F.Supp. at 1364. Litton's assertions that these decisions establish that *Carterfone* in fact gave customers the right to substitute "*any* telephone equipment" unless the carrier first proved it to be harmful cannot be correct: the FCC's regulations, *to this day*, prohibit the interconnection without a PCA of any unregistered PBXs, key systems, or other telephone instruments, whether or not they are harmful. 47 C.F.R. § 68.102 (1983); Petn. 13. The decisive factor, however, is that the reasonableness of Bell's advocacy can only be assessed in light of the state of the law in existence at the time the advocacy occurred, here the period from 1968 to 1973.[15]

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[14]Litton also relies (8-9, 25-26) on several subsequent and irrelevant court of appeals decisions. *North Carolina Utilities Commn.* v. *FCC*, 552 F.2d 537 (4th Cir. 1977), neither presented nor decided any question about the meaning of the mandate in *Carterfone*. Litton relies on a footnote (*id*. at 1042 n.3) that simply observes that *Carterfone* applied to attachments other than to the Carterfone itself. In *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 785 (1983), the issue was whether Bell's tariff filings were impliedly immune from antitrust scrutiny by virtue of the FCC decisions. The court held that they were not because they put Bell "on notice" that there could be future changes. *Id.* at 730-31. No question was raised as to the protected character of Bell's opposition to future changes.

[15]Judge Charles Richey has found that, when Walter Hinchman (see Tr. 1392-1516) was appointed Chief of the FCC's Common Carrier Bureau in 1974, the Staff "abandoned all objectivity" and "launched into a program . . . to create FCC findings that could be used as predicates in antitrust actions against the Bell System." *Southern Pacific Communications Corp.* v. *AT&T*, 556 F.Supp. 825, 1056-57 (D.D.C. 1983). The mere possibility that the FCC decisions between 1975 and 1978 might themselves have represented such revisionism demonstrates the importance of judging the reasonableness of advocacy in light of the clear regulations that existed when the advocacy occurred.

National Importance. Litton's assertions that this case has no national importance and that the issues it raises will never arise again are startling. The Second Circuit holding is destructive of representative government and will inhibit debate before regulatory agencies. Moreover, the questions presented are issues in *17* pending cases. Petn. p. 28 n.20. And the case will continue to spawn collateral litigation. This is demonstrated by the fact that, *despite* the standards of *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), one court now has given this judgment collateral estoppel effect in a private treble damages action and has certified that question to the Court of Appeals for the District of Columbia. *Jack Faucett Assoc., Inc.* v. *AT&T*, No. 81-1804 (D.D.C. June 27, 1983).

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August 9, 1983

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No. 82-2128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

v.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC. and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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v.

LITTON SYSTEMS, INC., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.1, the National Association of Regulatory Utility Commissioners (NARUC) hereby respectfully moves for leave to file the attached brief as *amicus curiae* in this case.

I.

STATEMENT OF INTEREST

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto

Rico, and the Virgin Islands, engaged in the regulation of carriers and utilities. The NARUC contains the State officials charged with the duty of regulating communication common carriers within their respective States. As such, they have the obligation to assure the establishment and maintenance of such communication service and facilities as may be required by the public convenience and necessity and the furnishing of service at rates that are just and reasonable. Because, as discussed below, sustaining the damage award in this case could result in increases in local rates, the NARUC and its members may be adversely and directly affected by the outcome of this case.

II.

REASONS FOR GRANTING THE MOTION

Pursuant to Section I(A) of the consent decree entered on August 24, 1982 in *United States v. Western Union,* Docket No. 82-0192 (D.D.C.), AT&T and the U.S. Department of Justice agreed upon, and submitted to the district court for approval, a plan of reorganization for a divested AT&T. On July 8, 1983 the district court issued an opinion approving the plan subject to several modifications being agreed to by the parties.[1]

Under the plan of reorganization, both as initially formulated and as modified by the district court, AT&T's contingent liabilities[2] are apportioned among AT&T and

[1] As of today, these modifications have not been agreed to.

[2] Contingent liabilities are liabilities which are attributable to predivestiture events but do not become certain, and are therefore not booked, until after divestiture. *U.S. v. Western Union,* Docket No. 82-0192, July 8, 1983 Opinion at n. 39. Contingent liabilities include liabilities for antitrust claims.

the local Bell Operating Companies on the basis of their relative net investment as of the date of the plan's implementation. Under Section VIII(H) of the decree, a proportionate share of the system's consolidated debt and equity is allocated to each Operating Company. The plan of reorganization provides that the post-divestiture entities will share in the contingent liabilities on the same basis.

If the $276,000,000 ($276 million) antitrust judgment against AT&T in this case is allowed to stand, each local Bell Operating Company will be liable for a portion of this amount. This amount will, either directly or indirectly, ultimately be recovered from the Operating Company's local ratepayers pursuant to tariffs approved by the applicable State utility commissions. The NARUC, charged with the duty and responsibility, through its members, of assuring that local telephone rates are not prohibitive, therefore has important reasons for urging that this Court hear this case. In representing State regulators, the NARUC also offers a unique perspective on the issues that should be useful to the Court's deliberations on whether to grant AT&T's petition for writ of certiorari.

III.

CONCLUSION

For the reasons stated above, the National Association of Regulatory Utility Commissioners respectfully requests the Court to grant this motion so that the NARUC may present its views in the attached brief.

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**ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT**

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of carriers and utilities. The NARUC contains the State officials charged with the duty of regulating communication common carriers within their respective States. As such, they have the obligation to assure the establishment and maintenance of such communication service and facilities as may be required by the public convenience and necessity

and the furnishing of service at rates that are just and reasonable.

If the $276,000,000 ($276 million) antitrust judgment in this case is allowed to stand, each of the Bell System Operating Companies will be required to contribute a proportionate share for payment of the judgment.[1] This amount will, either directly or indirectly, ultimately be recovered from the Operating Company's local ratepayers pursuant to State utility commission approved tariffs and could very likely cause increases in these tariffs. The NARUC, charged with the duty and responsibility, through its members, of assuring that local telephone rates are not prohibitively expensive, therefore has legitimate reasons for urging that the Court hear this case.

SUMMARY OF ARGUMENT

AT&T's filing and maintenance of the PCA[2] requirement, as well as its opposition to certification standards, was conduct protected under the *Noerr-Pennington* doctrine because it represented the espousal of a position before an administrative body. This conduct did not fall within the "sham" exception to *Noerr-Pennington* because it did not constitute the invoking of an administrative process for the injury that the process alone would work upon competitors.

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[1] Pursuant to provisions contained in the plan of reorganization of AT&T formulated pursuant to the consent decree entered into between AT&T and the U.S. Department of Justice in *United States v. Western Electric*, Docket No. 82-0192 (D.D.C.).

[2] "Protective Connecting Arrangement."

ARGUMENT

I. THE CONDUCT OF AT&T UPON WHICH THE JUDGMENT AGAINST IT WAS BASED WAS PROTECTED UNDER THE *NOERR-PENNINGTON* DOCTRINE

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) involved a publicity campaign waged by the railroad industry as part of its dispute with the trucking industry over control of interstate, heavy freight hauling. Representatives of the trucking industry sued a railroad trade association, alleging that a publicity campaign advocating pro-railroad legislation violated the Sherman Act because the company's sole purpose was to hinder the trucking industry's ability to compete with the railroads. The Court held that the Sherman Act was inapplicable because the railroads' activities constituted the "mere solicitation of governmental action with respect to the passage of and enforcement of laws." 365 U.S. at 138, 81 S.Ct. at 530. Whether the activities could be considered fraudulent or deceptive was immaterial and the question of intent was irrelevant.

> [I]nsofar as the railroads' campaign was directed toward gaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had. 365 U.S. at 139-140, 81 S.Ct. at 530.

United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), restated, and to some extent amplified, *Noerr*. *Pennington* reaffirmed *Noerr's* holding that anticompetitive intent did not make an otherwise legitimate attempt to secure governmental action illegal. "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670, 85 S.Ct. at 1593.

Pennington also made it clear that efforts directed at agencies were protected.

Finally, in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the *Noerr-Pennington* doctrine was broadened and strengthened by the Court's holding first, that it applied to administrative and adjudicative proceedings and, second, that it was constitutionally based. 404 U.S. at 510-511, 92 S.Ct. at 611.

Regardless of AT&T's intent, its filing and maintenance of a tariff which required interface hardware (the "protective connecting arrangement" or PCA) to interconnect terminal equipment, as well as its opposition to certification, represented conduct protected under *Noerr-Pennington.* AT&T's conduct constituted legitimate advocacy before an administrative agency and, as such, cannot be the basis for imposing antitrust liability.

Furthermore, AT&T's conduct did not constitute a "sham" which would deny it the protection of *Noerr-Pennington.* The sham exception comes into play when the process of administrative decisionmaking is invoked solely for the injury that the process alone will work upon competitors. *California Motor Freight, supra,* 404 U.S. at 513, 92 S.Ct. at 613. Here, AT&T truly sought by its conduct to influence the Federal Communications Commissions' decisions regarding certification and its PCA tariff and it had a reasonable expectation of obtaining a favorable decision from that agency. There is no evidence that AT&T's conduct was intended to injure Litton directly rather than through an FCC determination. As such, its conduct did not amount to the sort of abuse that falls within the *Noerr-Pennington* sham exception.

Finally, it is difficult to overrate the importance of the *Noerr-Pennington* doctrine to the State regulatory bodies charged with the responsibility of regulating the utility industry. *Noerr-Pennington* serves to facilitate the free flow of information between the State regulators and industry by insuring that antitrust concepts which are alien to the regulatory framework do not interfere with the States' ability to obtain the views, information and data necessary to regulate fairly and effectively. By rejecting *Noerr-Pennington* the court below has created an unnecessary chilling effect on the free flow of information between regulators and those they regulate.

CONCLUSION

For the reasons outlined above, the petition for a writ of certiorari should be granted and the case set for oral argument.

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PETITIONERS

v.

LITTON SYSTEMS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the *Noerr-Pennington* doctrine shields petitioners from liability for unlawful monopolization where the anticompetitive activities complained of consist primarily of the voluntary adoption of restrictive practices that were incorporated in tariffs accepted for filing by the FCC with an explicit disavowal of approval, and subsequent efforts by petitioners to mislead the FCC as to the technical necessity for the anticompetitive practices reflected in the tariffs.

2. Whether the district court's instructions, viewed as a whole, erroneously permitted the jury to reject petitioners' *Noerr-Pennington* defense simply because otherwise protected activities were undertaken with anticompetitive intent.

3. Whether a customer is barred from recovering charges paid pursuant to a tariff filed with a regulatory agency where the agency reserved the question of the lawfulness of the tariff upon its filing, and thereafter found the tariff to be unlawful.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

For a number of years petitioners AT&T, et al., allowed customers wishing to interconnect non-AT&T telephone terminal equipment to the Bell network to do so only through the use of an AT&T-provided interconnection device known as a "protective connecting arrangement." In this action filed in the district court by respondents Litton Systems, Inc., et al., a jury determined that petitioners' conduct in initiating and maintaining that interconnection requirement violated Section 2 of the Sherman Act, 15 U.S.C. 2, causing injury to Litton. The court of appeals affirmed the district court's judgment awarding damages to Litton.

1. For many years the Bell System maintained tariff provisions, known as "foreign attachment" provisions, pro-

hibiting its customers from attaching any terminal equipment device not supplied by a Bell operating company to its lines or equipment. See, *e.g.*, Resp. App. 27a n.1. In 1956, such a provision was invalidated in an action brought by the manufacturer of a device designed to be fastened mechanically to a telephone mouthpiece to provide privacy and reduce noise. *Hush-a-Phone Corp.* v. *United States*, 238 F.2d 266, 269 (D.C. Cir. 1956), rev'g 20 F.C.C. 391 (1955). The court of appeals held the foreign attachment restriction unlawful as an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental" (238 F.2d at 269). The court of appeals remanded the case to the FCC which then ruled (*Hush-a-Phone Corp.* v. *AT&T*, 22 F.C.C. 112, 113 (1957) (Resp. App. 28a)):

> [A]n inescapable consequence of the Court's opinion is to render such [foreign attachment] tariff regulations unjust and unreasonable insofar as they may be construed or applied to bar a customer from using other devices * * * which do not * * * impair the operation of the telephone system. As we construe the Court's opinion, a tariff regulation which amounts to a blanket prohibition upon the customer's use of any and all devices without discriminating between the harmful and harmless encroaches upon the right of the user to make reasonable use of the facilities furnished by the defendants.

In response, petitioners filed revised tariffs that permitted the attachment of some customer-provided equipment that would not be harmful to the Bell system, but continued to prohibit use of devices which had a direct electrical connection to Bell equipment or facilities, and devices that interconnected a Bell telephone line or channel to any other communications line or channel. See, *e.g.*, *In re Use of the Carterfone Device*, 13 F.C.C. 2d 420, 427 & n.6, reconsideration denied, 14 F.C.C.2d 571 (1968).

These provisions were challenged in 1965 by the manufacturer of the Carterfone, a device designed to inter-

connect a customer's telephone with a mobile radio system. The challenge prompted an FCC investigation.[1] The Commission concluded that the revised tariff restrictions were unlawful because they prohibited the use of the Carterfone and other devices without regard to actual harm caused to the telephone system. *In re Use of the Carterfone Device*, 13 F.C.C.2d 420, reconsideration denied, 14 F.C.C.2d 571 (1968) (Resp. App. 33a-40a, 43a-47a). The FCC held, moreover, that the tariff had been unlawful "since its inception" (Resp. App. 38a), "there being no material distinction between a foreign attachment such as the Hush-A-Phone and an interconnection device such as the Carterfone" (Resp. App. 36a-37a). The Commission invalidated the foreign attachment provisions both as applied to interconnection and to electrically connected devices (Resp. App. 45a & n.4). It invited the carriers to submit new tariffs "which will protect the telephone system against harmful devices," and offered the carriers the opportunity to "specify technical standards if they wish" (Resp. App. 39a).

Petitioners responded with revised foreign attachment provisions that are the subject of this litigation. The new tariffs permitted the connection of customer-supplied terminal equipment, but required any interconnection to be made through a Bell-supplied interface device known as a protective connecting arrangement (PCA). *In re AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 608 (1968), reconsideration denied, 18 F.C.C.2d 861 (1969) (Pet. App. 162a, 165a). Numerous parties objected to the tariff, claiming it violated *Carterfone* and was otherwise unlawful (Pet. App. 166a). The Commission ruled, however, that because the new tariffs did not contravene the express directives of *Carterfone*, which

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[1] **Carter had instituted an antitrust suit in the federal courts. *Carter* v. *AT&T*, 250 F. Supp. 188 (N.D. Tex.), aff'd, 365 F.2d 486 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967). The district court deferred to the primary jurisdiction of the FCC, and the Commission then conducted the investigation leading to its *Carterfone* decision.**

"dealt with interconnections and not replacements of any part of the telephone system," it would allow the tariffs to become effective pending Commission review (Pet. App. 167a). It emphasized that "in doing so we are not giving any specific approval to the revised tariffs" (Pet. App. 167a), repeating: "[o]ur action is not to be construed as approval" (Pet. App. 168a). The Commission simultaneously ordered its staff to investigate further changes that might be necessary to resolve the "questions presented by the tariff revisions" (Pet. App. 167a-168a).

Reports prepared for the Commission by independent experts in pursuance of this investigation indicated that an appropriate program of standardization and certification could adequately protect the telephone network from harm from customer-provided equipment and facilities. Accordingly, the Commission created two advisory committees to study the possibility of establishing such standards. See Pet. App. 177a. The Commission also initiated a rulemaking to determine whether and under what terms and conditions customers should be permitted to provide their own terminal equipment and any necessary connecting devices. *In re Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539 (1972) (Pet. App. 176a-180a).

In 1973, the Commission released for public comment the report of the PBX Standards Advisory Committee, which recommended a certification program for PBX systems.[2] See *First Supplemental Notice*, 40 F.C.C.2d 315 (1973) (Pet. App. 182a-186a).[3] That recommendation was made over the objection of petitioners' representa-

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[2] Private branch exchanges (PBX) and key telephone systems (KTS) are telephone systems used for businesses. PBX employs a central console or switching mechanism to allow interconnection of up to several thousand telephones. KTS allows a single telephone set to connect several others through the use of buttons on the telephone. Pet. App. 8a.

[3] A report of the Commission's Office of the Chief Engineer proposing to extend certification to all customer-provided devices was also released for comment (see Pet. App. 183a).

tives on the committee (Pet. App. 20a n.9). At about the same time, AT&T undertook a campaign to oppose certification, declaring its preparedness to do so in public speeches, and then filing comments before the FCC (Pet. App. 20a-21a).

In 1975 the Commission promulgated standards for the registration of terminal equipment other than private branch exchange and key telephone systems. *In re Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS*, 58 F.C.C.2d 593 (1975) (Resp. App. 51a-72a).[4] The Commission concluded that the PCA requirements were an "unnecessarily restrictive limitation on the customer's right to make reasonable use of the services and facilities furnished by the carriers" (Resp. App. 56a). It ordered the carriers not to "require the use of such connecting arrangements or other interface devices or arrangements for FCC registered equipment or protective circuitry, and [not to] impose other tariff conditions contrary to the *Carterfone* policy" (Resp. App. 57a).[5]

Four months later, PBX and KTS were included in the registration program. *Second Report and Order*, 58 F.C.C.2d 736 (1976), aff'd *sub nom. North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977) (Resp. App. 79a-93a).

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[4] The Commission was "tentatively of the view that there is no valid distinction as to the potential for harm from any of the excluded classes of devices," but decided to allow interested parties an opportunity for further comment on the inclusion of PBX and KTS equipment (Resp. App. 58a).

[5] The Commission stated (Resp. App. 54a (emphasis in original)):

> The *Carterfone* Decision placed the burden of proof squarely upon the carriers—not the users or this Commission—to demonstrate that a particular unit or class of customer-provided equipment would cause either technical or economic harm to the telephone network * * *; this burden was to be met *prior* to the filing of a tariff restricting the use of such equipment. The information accompanying the tariff revisions filed pursuant to *Carterfone* did not demonstrate * * * [such] harm * * * [absent the] connecting arrangements provided for in the tariff.

The Commission reiterated the unlawfulness of the requirement that such equipment be connected to the network solely through telephone company provided PCAs (Resp. App. 89a).

2. a. In 1976 respondents Litton, et al., filed their complaint in this action, alleging that petitioners had monopolized the sale and leasing of telephone terminal equipment, including PBX and KTS equipment designed to connect a user's business telephones to petitioners' trunk lines, in violation of Section 2 of the Sherman Act (Pet. App. 95a). Litton had entered the telephone terminal equipment market in 1971, and claimed that petitioners' anticompetitive activities had caused it to withdraw from the market in 1974.

Petitioners moved to dismiss the complaint, claiming antitrust immunity under the *Noerr-Pennington* doctrine,[6] the "state action" doctrine, and because interstate telecommunications is a regulated industry. The district court denied that motion (Pet. App. 94a-127a).

A jury subsequently ruled for respondents on some, but not all, of their claims.[7] In special findings of fact, the jury concluded that petitioners had unreasonably filed an anticompetitive interface device tariff, had opposed certification in bad faith, had intentionally delayed the provision and installation of PCAs, had refused in bad faith to sell wiring for customer-provided equipment, and had delayed in making "cutovers" to customer-provided equipment (Pet. App. 21a n.11). The jury found that as a result of petitioners' antitrust violations respondents had suffered actual damages of $92 million. Pursuant to 15 U.S.C. 15 judgment was entered against petitioners for three times that amount.

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[6] See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

[7] The jury rejected respondents' claim of predatory pricing and their claim that petitioners had intentionally provided unduly expensive, inefficient or unreliable interconnection services (see Pet. App. 156a-160a).

b. A unanimous court of appeals affirmed (Pet. App. 1a-91a). The court rejected petitioners' *Noerr-Pennington* defense, holding *Noerr* "plainly inapposite" because petitioners were engaged in private commercial activity, rather than seeking to procure the passage or enforcement of laws (Pet. App. 44a). The unlawful PCA requirement, the court found, was the product of petitioners' business judgment, fashioned in the AT&T board room, not at the FCC (*ibid.*). The court of appeals explained (Pet. App. 44a-45a): "The fact that the FCC might ultimately set aside a tariff filing does not transform AT&T's independent [business] decisions * * * into a 'request' for governmental action or an 'expression' of political opinion." Petitioners' opposition to certification, the court reasoned, was likewise unprotected from antitrust scrutiny because it was "simply the other side of the interface tariff coin" (Pet. App. 47a). Filing and maintenance of the PCA tariff provision necessarily embodied "opposition to the only feasible alternative—certification standards" (*ibid.*).

Alternatively, the court concluded that even if petitioners' activities fell within the ambit of *Noerr-Pennington,* they were covered by the "sham" exception to that doctrine (Pet. App. 48a-54a). The court found that petitioners' attempt to gain FCC approval for the PCA was "baseless" (*id.* at 51a-52a); that their efforts to maintain the PCA provisions were intended to delay, not persuade (*id.* at 53a-54a); and that petitioners affirmatively misled the FCC regarding the technological need for the PCA (*id.* at 52a). This amounted to an "abuse of the administrative process" (*id.* at 53a), and thus fell within the sham exception (*id.* at 54a).[8]

DISCUSSION

The court of appeals' decision is correct, does not conflict with any decision of this Court or of any other court

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[8] The court also rejected petitioners' contentions that the jury had been improperly instructed on the *Noerr* defense and that the jury's findings were not sustainable (Pet. App. 54a-63a).

of appeals, and does not raise any issue of clear general importance. Further review accordingly is not warranted.

1. a. The *Noerr* doctrine establishes that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961). The fact that the request for restrictive governmental action is motivated by a purpose to restrain competition does not, by itself, deprive one of the right to seek such governmental action. Indeed, this Court has determined that the legality of conduct directed at obtaining governmental action is "not at all affected by any anticompetitive purpose" the conduct may have had. *Noerr*, 365 U.S. at 140; *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669 (1965). These principles extend to petitioning activities before administrative and judicial bodies as well as before legislators. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

The *Noerr* doctrine is based on the concern that imposing antitrust liability for requesting a governmental body to restrain competition would impair the power of government representatives to ascertain the will of the people and could infringe on the First Amendment right of petition (365 U.S. at 137-138). But *Noerr* immunity is not absolute. From the inception of the doctrine an exception has been recognized for "situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor" (*Noerr*, 365 U.S. at 144). One who thus *abuses* the administrative process "cannot acquire immunity by seeking refuge under the umbrella of 'political expression'" (*California Motor Transport Co.*, 404 U.S. at 513). The "sham" or "abuse of process" need not take any particular form. Rather, "[t]here are many * * * forms of illegal and reprehensible practice which may corrupt the administrative * * * processes and which may result in antitrust violations" (*ibid.*).

b. (i) The court of appeals correctly held that petitioners' filing and maintenance of tariffs reflecting their anticompetitive insistence on use of their interface devices does not immunize the conduct described in the tariff. The *Noerr* doctrine excludes from the scope of the Sherman Act private attempts to induce government agencies to restrain competition by *governmental action.* It has no application to private conduct which itself directly restrains competition. Here, the alleged anticompetitive effects stemmed from private conduct subsequently *described* in tariffs, not from any government action taken pursuant to the tariffs.[9] The tariffs were devised and maintained by petitioners. They were not submitted to the FCC to influence some broader agency rulemaking decision or enforcement policy, but simply to comply with the law that governs petitioners as a regulated monopoly.[10] The decision to establish and maintain an anticompetitive policy and to describe it in a tariff is not the type of petitioning activity deemed beyond the Sherman Act, even though a necessary step in the maintenance process is the filing of the tariff with a regulatory agency. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976) (plu-

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[9] According to respondents' evidence, the PCA requirement imposed by petitioners and described in their tariffs operated to prevent petitioners' competitors from competing effectively. The cost of the PCA, which exceeded the cost of renting a single telephone, was sufficient to foreclose sales of Key Telephone systems of five lines or less, 90% of the KTS market (Pet. App. 30a-31a). Petitioners' PCA requirement also frustrated competition by causing customers to doubt the quality of respondents' products (Pet. App. 30a).

[10] The filing of tariffs that describe voluntary private conduct with state or federal agencies as a condition of operating a government-granted monopoly should be contrasted with situations where business entities singly or jointly petition an administrative agency for protectionist rules or market entry decisions. In the latter situation, even though anticompetitive motives predominate, *Noerr* applies, subject to the sham exception; in the former case, *Noerr* has no application to the conduct described in the tariff because no attempt to create new law (or seek enforcement of existing law) is implicated.

rality opinion); *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982), cert. denied, No. 81-2278 (Jan. 24, 1983); *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 982 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981).[11]

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[11] Even if the act of filing a tariff with the FCC, viewed in isolation, is regarded as immunized under *Noerr*, the adoption of a private anticompetitive policy or practice which is described in a tariff is not. The act of filing is only one of a series of acts undertaken to devise and maintain the tariff. Although petitioners were required to file tariffs with the FCC, they were under no legal obligation to include the PCA provisions, and they remained free to delete those provisions at any time.

In *Cantor* the plurality stated that "nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented * * * is a sufficient reason for conferring antitrust immunity on the proposed conduct" (428 U.S. at 601-602). While Chief Justice Burger and Justice Blackmun wrote separately to address the "state action" issue in the case, neither expressed disagreement with the plurality's view of *Noerr*.

In this case, of course, the agency explicitly declined to lend its imprimatur to the tariff provision at issue (see pages 3-4, *supra*). And petitioners could have revoked the tariffs at any time on their own initiative (see Pet. App. 45a n.32). The court of appeals correctly observed that if petitioners' "conduct in devising and filing the tariffs is immunized because the tariffs were contested and AT&T defended them before the FCC * * * a common regulatory practice designed to protect consumers would instead shield from antitrust liability the very entities the practice seeks to restrain and regulate" (Pet. App. 42a-43a & n.30).

Where Congress intends regulatory review to insulate a regulated practice from the antitrust laws, it has made explicit provision for immunity. Congress has not created an antitrust exemption for practices described in tariffs filed with the FCC, however. Instead, it has provided an antitrust exemption only for certain types of mergers or acquisitions approved by the FCC, see 47 U.S.C. 221 and 222, and has made other regulated practices subject to antitrust scrutiny. *United States* v. *RCA*, 358 U.S. 334, 350-352 (1959); *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 726-735 (9th Cir. 1981), cert. denied, No. 81-2359 (Jan. 17, 1983); *Northeastern Telephone Co.* v. *AT&T*, 651 F.2d 76, 82-84 (2d Cir. 1981); *Essential Communications Systems, Inc.* v. *AT&T*, 610 F.2d 1114, 1116-1125 (3d Cir. 1979); *Carter* v. *AT&T*, 365 F.2d 486, 497 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967).

Perhaps in recognition of this rule of law, petitioners appear to have abandoned their claim that the PCA requirement reflected in their tariffs itself is protected by *Noerr*, and now argue only (Pet. 19-28) that their "opposition to certification" is protected under *Noerr*. Indeed, in this Court, petitioners suggest that the antitrust legality of the conduct described in their tariff filings is "irrelevant" to the judgment (Pet. 20 n.12). Far from being irrelevant, however, the jury's finding, affirmed by the court of appeals, that petitioners' PCA requirement was an unreasonable restraint on competition (Resp. App. 22a) constitutes an alternative basis, independent of the opposition to certification issue, on which the court of appeals' decision could be affirmed. Because there is a readily sustainable basis for the decision below, this Court need not consider whether the court of appeals' discussion of petitioners' opposition to certification merits plenary review. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); cf. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61-62 n.11 (1975).

(ii) Petitioners' efforts to depict this case as one turning on the question whether a regulated monopolist's opposition to a regulator's proposal to increase competition is violative of the Sherman Act is in any event unfounded. Based upon its review of all of the evidence, the court of appeals concluded that petitioners' activities in opposing certification "embraced much more than merely advocating a position before the FCC" (Pet. App. 48a). Aware of its inability to document any case of harm to its network from interconnections that did not employ the PCA (Pet. App. 26a), and believing that adoption of a certification system was inevitable (Pet. App. 28a), AT&T nonetheless publicly anounced its intention to oppose certification as a replacement for the PCA—a requirement that petitioners' staff and management had recognized to be unnecessary (Pet. App. 20a-21a, 25a-26a). This publicly announced campaign to fight certification may have reduced customer willingness to purchase respondents' equipment for reasons of expense or unfounded concerns

about safety (Pet. App. 30a-31a), and must have signalled to petitioners' competitors that establishment of competition on fair terms would be substantially delayed because petitioners would maintain the PCA requirement until the FCC held it unlawful. These factors led to respondents' decision to withdraw from the market (Pet. App. 32a).[12]

In addition to making unsupportable claims to the FCC regarding the need for the PCA to avoid network harm, AT&T "feigned cooperation with the PBX Advisory Committee's efforts to develop certification standards," [13] and "generally attempted to buy as much time as possible to improve its own competitive position at the expense of Litton and other competitors" (Pet. App. 48a (footnote omitted); see also *id.* at 28a, 29a). This was plainly far more than the mere "expression of opinion" before a governmental agency.

(iii) Even if petitioners' opposition to certification before the FCC, which was but one part of a campaign to oppose certification, were regarded as within the ambit of *Noerr*, there was a substantial basis in the record for the court of appeals' alternate conclusion that the case fell within the "sham" exception to *Noerr*.[14] The court

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[12] Invoking the First Amendment, petitioners claim (Pet. 26) that the judgment below improperly rests in large measure on a speech by AT&T's Chairman, John de Butts, announcing AT&T's intention to oppose certification. Whatever weight the court of appeals may have placed on this particular incident, the court's decision shows that this speech was significant, not for the opinions expressed, but as the public announcement of petitioners' determination to maintain their PCA requirement. Cf. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969).

[13] This "feigned cooperation" was "in accordance with an internal [AT&T] 'Tactics Memorandum' which concluded that withdrawing from the committee would accelerate 'decisions in favor of certification'" (Pet. App. 53a).

[14] The jury found that petitioners opposed certification in bad faith (Resp. App. 23a) and, given their monopoly power, thereby violated the Sherman Act. Petitioners attribute this finding to an allegedly erroneous jury instruction that supposedly caused the

found that AT&T's opposition to certification was not a bona fide attempt to influence agency decisionmaking, but a calculated bid to directly restrain competition by delaying creation of a competitive market structure for terminal equipment—a development that petitioner recognized to be inevitable (Pet. App. 51a-54a). Petitioners also made "baseless claims relative to potential harms" (*ibid.*), knowing "that the interface device was redundant, uneconomic, and unnecessary" (*id.* at 52a, 27a).[15] Moreover, the court found that petitioners had "affirmatively misled the FCC with respect to the need for the PCA requirement and the difficulty of developing certification standards" (Pet. App. 52a).

These activities represent abuse of the administrative process and are not entitled to protection under the *Noerr* umbrella.[16] Nothing in *Noerr* grants a regulated monopo-

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jury to find "bad faith" because the jury found that petitioners opposed certification before the FCC for the purpose of restraining competition (Pet. 26). As indicated below (pages 17-19, *infra*), petitioners mischaracterize the jury instructions. Under the instructions given, it is reasonable to conclude that the jury's finding of "bad faith" is attributable to a belief that, as respondents had argued, petitioners used the administrative process solely for delay.

[15] Petitioners adopt (Pet. 23-26) an overly narrow view of the evidence supporting the court of appeals' characterization of its misrepresentations and baseless claims. For instance, petitioners imply (Pet. 25) that the primary basis for the court of appeals' conclusion that their petitioning activities were "baseless" was an erroneous assumption that the PCA tariff and opposition to certification "violated the 'mandate in *Carterfone* * * *'" The court of appeals did not state or assume that petitioners had "violated" *Carterfone*, however. Rather, the court correctly observed that the tariff did not "square[] with" the *Carterfone* and *Hush-A-Phone* decisions, which conditioned the restrictions on the use of customer provided equipment on a showing of *actual harm* to the telephone network (Pet. App. 51a). But see pages 20-21, *infra*.

[16] Petitioners state (Pet. 22) that "[t]he ultimate test of whether conduct may be penalized as a sham is whether it, *'like intentional falsehoods or knowingly frivolous claims,'* consists of activities that can be penalized without inhibiting debate of public affairs * * *" (emphasis added). The jury was adequately instructed on the sham

list the right to abuse the very process designed to keep the monopoly in check. As the National Association of Regulatory Utility Commissioners observes (Br. 5), governmental bodies charged with regulating the utility industry rely on information supplied by the industry to perform their regulatory tasks. While the *Noerr* doctrine properly assures that ideas and information flow freely, it does not countenance misrepresentations and misinformation calculated to impede, rather than promote, fair and effective regulation. *Woods Exploration & Producing Co.* v. *Aluminum Co.*, 438 F.2d 1286, 1297 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972); see also *Hospital Building Co.* v. *Trustees of Rex. Hospital*, 691 F.2d 678, 687, 688 (4th Cir. 1982), cert. denied, No. 82-1633 (Oct. 11, 1983); P. Areeda, *Antitrust Law* ¶ 204.1a, at 27 (Supp. 1982); *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272, 274-279 (D.C. Cir. 1972). Because the sham exception to the *Noerr* doctrine is an independently sufficient basis for the judgment below, there is no occasion to review the court of appeals' conclusion that petitioners' conduct was, in any event, unprotected by the *Noerr-Pennington* doctrine.

c. Petitioners' assertion that the court of appeals' application of the sham exception discloses a conflict among the circuits (Pet. 22) rests on two erroneous assumptions: that their own conduct was "normal and legitimate advocacy"; and that the other court decisions cited hold that sham conduct must be "overtly corrupt." In fact, a

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exception to *Noerr* (see page 19, *infra*). The court of appeals found considerable evidence in the record that would permit the jury to conclude that the standard espoused by petitioners was met here.

Elsewhere, petitioners read the sham exception to encompass only instances where the defendant itself initiates a baseless proceeding (Pet. 23). This limitation is unfounded. For instance, in *California Motor Transport Co., supra*, defendants' unprivileged activities consisted of opposing competitors' license applications. Defendants did not initiate those proceedings but were permitted to comment. See *Trucking Unlimited* v. *California Motor Transport Co.*, 432 F.2d 755, 757 (9th Cir. 1970). The proceedings to which the sham exception extends should be coextensive with those as to which the *Noerr* defense can be asserted.

properly instructed jury and the court of appeals each concluded that petitioners' conduct did not constitute "legitimate" advocacy designed to persuade the agency to adopt a particular rule and was designed instead to delay change recognized as inevitable and to mislead the agency. And the court of appeals decisions on which petitioners rely do not suggest that *Noerr* is applicable where a defendant lacks a bona fide intention to influence agency action or abuses the administrative process, and accordingly are consistent with the decision below.[17]

Contrary to petitioners' assertion (Pet. 24), the decision below does not conflict with those of other circuits insofar as the court of appeals declined to accord "absolute[] protect[ion]" to AT&T's misrepresentations to the

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[17] In *Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 663 F.2d 253, 263 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982), the defendants had secured anti-competitive regulations by lobbying the Iowa Board of Pharmacy Examiners. The court found "no showing that [defendants] engaged in any but legitimate political attempts to secure governmental action," and no "abus[e of] governmental process" or "baseless" actions. In *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1081 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977), the court noted that the sham exception is applicable where the defendant "is not seeking official action by a governmental body" but found the exception inapplicable, explaining "[h]ere it is clear that defendants were seeking and obtained official action from a governmental body." In *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1366-1367 (10th Cir. 1972), "it [was not] shown that defendants were guilty of fraud, corruption *or misuse* of the state processes." And *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372, 1384 (5th Cir. 1980), cert. denied, 449 U.S. 912 (1980), held that, while submissions made by petitioners to the FCC in defending itself against a complaint charging unlawful refusal to interconnect were protected under *Noerr*, conduct "not directed toward influencing governmental action"—*i.e.*, refusal to interconnect itself—was not entitled to *Noerr* immunity. And while the district court stated in *United States* v. *AT&T*, 524 F. Supp. 1336, 1362-1363 (D.D.C. 1981), that the sham exception clearly applies to conduct that is "overtly corrupt," the court ruled that the exception applies as well to other forms of activity including "subvert[ing] the integrity of the governmental process through misrepresentations."

FCC. The calculated misrepresentations found to deprive petitioners of a *Noerr* defense here were a part of petitioners' overall strategy of obstructing the administrative process. Thus, the court of appeals' ruling here parallels the holding in *Woods Exploration & Producing Co.* v. *Aluminum Co.*, 438 F.2d 1286, 1297 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972), on which petitioners rely (Pet. 24). In *Woods Exploration* the court of appeals held the filing of false information to be unprotected under *Noerr* because the filing was not an attempt to influence new railroad commission policies but to undermine the existing regulatory scheme.[18]

Nor does the district court's decision in *United States* v. *AT&T*, 524 F. Supp. 1336 (D.D.C. 1981), create a "conflict" with the court of appeals' decision here (cf. Pet. 22-23). There, Judge Greene found that most of AT&T's "petitioning activities"—including its position before the FCC in its certification docket—were *Noerr* protected (524 F. Supp. 1363 & n.110).[19] But in practical effect there is no conflict, for Judge Greene also determined that

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[18] *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 231 (7th Cir. 1975), is not inconsistent with the decision below. The court there determined that the use of misrepresentations to induce governmental action did not preclude the application of *Noerr*, but there government action was genuinely sought. Similarly, in *Mark Aero, Inc.* v. *Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978), the court held *Noerr* to apply where misrepresentations were used to influence city officials not to reopen an airport. The court noted that the "sham" exception involves a question of "intent," *i.e.*, whether there was a bona fide intent to influence government action or merely an intent to injure competition directly. While the Seventh and Eighth Circuits determined that the former intent existed in the particular cases before them, the contrary conclusion reached by the jury and the court of appeals here simply reflects the evidence in the record of this case.

[19] Judge Greene's ruling extended *Noerr* protection only to petitioners' FCC filings themselves (524 F. Supp. 1363 n.110) and not to any other activities undertaken by petitioners in opposing certification. The "opposition to certification," for which petitioners were held liable here, encompassed more than filings with the FCC (see pages 11-12, *supra*).

petitioners' maintenance of the PCA tariff during the pendency of the FCC's certification proceeding was not protected under *Noerr* and that the United States had made out a prima facie case that maintenance of this requirement was unlawful under the Sherman Act (524 F. Supp. at 1381). Moreover, Judge Greene's interpretation of the sham exception is entirely consistent with the decision of the court of appeals here. Thus, he recognized that the *Noerr* doctrine is inapplicable where it is "show[n] that defendants subverted the integrity of the governmental process through misrepresentations or similarly unprotected conduct" (524 F. Supp. at 1363). Indeed, Judge Greene found that AT&T's activities in opposing a competitor's application to construct a nationwide digital network were not shielded by *Noerr* where AT&T's internal documents permitted the inference that its "sole purpose in opposing [that] application was to preserve its monopoly and that it well knew that the positions it took before the FCC were baseless" (524 F. Supp. at 1364). Thus any divergence between the ruling below and the ruling in AT&T reflects only the application of consistent principles to the records of two different cases.

d. Petitioners claim that the district court's jury instructions concerning the *Noerr* doctrine were erroneous because they made "the threshold question of the protected character of opposition to certification depend on a finding by the preponderance of the evidence that Bell's 'purpose was to exclude competition' " (Pet. 27 (footnote omitted)). Petitioners mischaracterizes the jury charge.

The correctness of the district court's charge must, of course, be gauged not from isolated statements but by reading the instructions as a whole. *United States* v. *Park*, 421 U.S. 658, 674-675 (1975). While the trial court refused to give an instruction proffered by petitioners that "[e]fforts to influence public officials do not violate the antitrust laws, even if they are intended to eliminate competition" (Pet. App. 146a), that was not prejudicial error, for a trial court is not required to in-

struct the jury in the precise form and manner requested by the parties; the instruction need contain only an adequate statement of the law. *Agnew* v. *United States*, 165 U.S. 36, 51 (1897).

Petitioners correctly insist that the availability of *Noerr* protection does not depend on whether one's motive in attempting to influence governmental action is anticompetitive. Indeed, the court of appeals expressly recognized (Pet. App. 40a, 55a n.40) that *Noerr* is not rendered inapplicable solely because petitioning is accompanied or prompted by an anticompetitive motive. But the court of appeals also correctly recognized that, although portions of the jury instructions, if read in isolation, could have been more explicit in this regard, viewed in its entirety the charge correctly instructed the jury (Pet. App. 57a).

Thus, the district court initially instructed the jury (Pet. App. 153a-154a):

> The question for your decision is whether Bell's opposition [to certification or registration programs] was interposed in bad faith for the purpose of excluding competition or whether Bell took this position because it believed that the registration proposals being made were not in the public interest and would not provide sufficient protection to Bell System employees, customers and the telephone network.

To this point, the charge appears to be defective because a jury could improperly conclude that an anticompetitive motive would subject petitioners to liability. Any defect was corrected, however, by a subsequent instruction that "harm to competition" resulting from petitioners' advocacy before the FCC would not render such advocacy unlawful (Pet. App. 155a):

> the First Amendment guarantees that persons or corporations may participate in good faith efforts to influence the passage or enforcement of laws or government regulations or to influence public officials regardless of whether the results of the government action they seek would be harmful to competition.

The district court also instructed that creation of delays by advocating a position before an agency or the

courts "does not constitute wilful exercise of monopoly power as long as the petition or application to the courts is based on a good faith interest in influencing the agency or obtaining a court ruling" (Pet. App. 155a-156a). The court then explained the sham exception to *Noerr*, essentially tracking the language of *Noerr* and *California Motor Transport Co.* (Pet. App. 156a):

> [T]here is an exception to the general rule that efforts to influence public officials do not violate the antitrust laws, and that is the so-called sham or bad faith exception. If a campaign, ostensibly directed toward influencing government action, is a mere sham or artifice to cover what is essentially nothing more than an attempt to smother competition by a pattern of knowingly filing baseless claims or making misrepresentations to administrative agencies in a way designed to deprive competitors of meaningful access to those agencies, the First Amendment protections are lost and the Sherman Act applies.[20]

The jury instructions given accordingly clearly apprised the jury that efforts to influence public officials, no matter how anticompetitive in motivation, do not violate the anti-

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[20] Petitioners' only complaint concerning this portion of the charge is that the court should have required the jury to find a predicate for application of the sham exception by "clear and convincing" evidence (see Pet. 27 & n.18). The established rule, however, is that an antitrust plaintiff must prove its case by a preponderance of the evidence. *Herman & MacLean* v. *Huddleston*, No. 81-680 (Jan. 24, 1983); Devitt & Blackmar, *Federal Jury Practice and Instructions* § 90.22 (1977). This Court has never suggested that the standard of proof is elevated when *Noerr* issues are raised. In *United Mine Workers* v. *Pennington, supra*, the district court was reversed because the jury instructions on the sham exception were defective, but the Court did not intimate any requirement for a "clear and convincing" evidence instruction. See also P. *Areeda, supra*, ¶ 203.4a, at 22. The court of appeals observed here that "by requiring a plaintiff to prove that a defendant's conduct was a sham, the Supreme Court has already struck a rough balance between the competing First Amendment and antitrust interests" (Pet. App. 58a).

trust laws unless they fall within the sham or bad faith exception.

e. Petitioners also claim that, even apart from the *Noerr* doctrine, their "conduct cannot be held to violate the antitrust law if it was a reasonable attempt to comply with the then existing state and federal regulatory requirements" (Pet. 27). Petitioners contend that their post-*Carterfone* tariffs were "repeatedly held to comply with existing state and federal regulations" (*id.* at 3-4), and that the "FCC never held that the PCA requirements had been illegal" (*id.* at 4). This argument assumes (see Pet. ii, 28) a version of the facts which neither the jury nor the court of appeals adopted and which is contrary to the actual course of administrative proceedings as characterized by the FCC. In its *Second Report and Order, supra,* calling for the elimination of PCA requirements for PBX and Key Telephone systems, the Commission stated that the "matter now before [us] is a direct outgrowth of, and falls within the overall policy framework estabished by, the Commission's *Hush-A-Phone* and *Carterfone* decisions" (Resp. App. 80a, 82a (footnote omitted)). The Commission pointed to its *Hush-A-Phone* ruling that any tariff regulation that prohibits customer-provided devices, without discriminating between the harmful and the harmless, is unjust and unreasonable (Resp. App. 80a). The Commission stated that *Carterfone* had enunciated "a broad general policy" (*ibid.* (footnote omitted)), and that the issue of whether customers may interconnect their equipment with the telephone network via direct electrical connections "was decided * * * in *Hush-A-Phone* and *Carterfone*" (*id.* at 82a).

The court of appeals did state incorrectly that, as early as *Hush-A-Phone*, the FCC had decided "that AT&T could not exclude 'any device'—*a category clearly including telephone terminal equipment*—absent a showing of actual harm" (Pet. App. 51a (emphasis added)). Whether customers should be allowed to provide their own *telephone instruments* was still an unresolved question at the time of *Carterfone* and was specifically re-

served by the Commission there (Resp. App. 44a; Pet. App. 176a-180a). We cannot say to what extent this error may have influenced the court of appeals' decision. Whether or not the PCA requirement was in technical violation of the *Carterfone* "mandate," however, does not affect respondents' core claim sustained by the courts below: that petitioners devised and maintained an anticompetitive policy, which they incorporated into tariffs, and that petitioners sought to maintain their restrictive practices despite knowledge that they were not necessary to prevent harm to the Bell network (as they had claimed).

Clearly, neither establishment nor maintenance of the restrictive requirements reflected in the PCA tariffs was required by the Communications Act or the Commission's orders. That the FCC accepted the tariff for filing does not shield it from Sherman Act challenge. *Cantor* v. *Detroit Edison Co., supra*; see also *California* v. *FPC*, 369 U.S. 482, 488-489 (1962); *United States* v. *RCA*, 358 U.S. 334, 350-352 (1959). In this case, especially, temporary regulatory acquiescence cannot be viewed as government approval because the FCC expressly reserved judgment in accepting the tariff for filing, and declared the tariff unlawful after it had the opportunity to investigate it (Resp. App. 56a-57a). In so ruling, the FCC noted that AT&T had failed over a seven-year period to establish any of ~~their~~ factual claims that PCAs were necessary to prevent harm to their equipment or personnel (Resp. App. 56a).[21]

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[21] The cases on which petitioners rely in suggesting that their actions were "reasonable attempt[s] to comply with * * * existing [law]" (Pet. 27 n.19) present no conflict for the Court to resolve. *Phonetele, Inc.* v. *AT&T*, 664 F.2d at 737-743, supports rather than conflicts with the court's holding here. *Phonetele* held that AT&T did not, as a matter of law, have immunity for its post-*Carterfone* tariff (*id.* at 733). The court of appeals did state that *if* AT&T could eventually show as a matter of fact that "its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws" (*id.* at 738). The record in this case reflects petitioners' inability to make that showing. In *Mid-Texas, supra*,

2. Petitioners' final claim, that *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), precludes respondents from recovering charges paid under the filed PCA tariff (Pet. 28), is unfounded.[22] In *Keogh* an antitrust plaintiff was barred from recovering damages for rates that had been investigated and approved by the Interstate Commerce Commission prior to its acceptance of the tariff. The decision rested on the fact that "[t]he instrument by which Keogh is alleged to have been damaged is rates approved by the Commission" (260 U.S. at 161). The Court found that an antitrust damage remedy would frustrate a paramount purpose of the Interstate Commerce Act—the prevention of unjust discrimination among shippers—and would improperly allow an antitrust court to second-guess a rate structure approved by the government agency charged with rate regulation (*id.* at 163-164). In subsequent references to *Keogh*, this Court has always emphasized that it rested on Commission *approval* of the tariffed rates. See *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 452 (1945); *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8

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the Fifth Circuit held that because AT&T's actions in denying competitors interconnection rights were not "compelled" by state regulatory actions, they were not immunized under the Sherman Act (615 F.2d at 1382). The court noted that "Bell's claimed reliance on public interest concerns in denying an interconnection request are relevant to an assessment of Bell's alleged monopolistic purpose or intent" (*id.* at 1381), but that this was an issue of fact. And petitioners' effort to analogize their position to that of the New York Stock Exchange in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), reflects a fundamental misconception respecting their own regulatory position. The Communications Act does not prescribe a policy of "self-regulation" for petitioners. Compare 373 U.S. at 349.

[22] This contention, if valid, presumably would undercut only that portion of the damage award which represented the charges respondents paid for PCAs as customers of petitioners. See *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1276 (9th Cir. 1982); *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d at 1179.

(1968); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 272 (1972) (Brennan, J., dissenting). In this case the FCC never approved the PCA tariff and, after investigation, rejected it as unlawful. The court of appeals accordingly properly held *Keogh* inapplicable (Pet. App. 73a-74a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

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No. 82-2128

IN THE

Supreme Court of the United States

October Term, 1983

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

vs.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO AMICUS CURIAE BRIEF OF THE UNITED STATES

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AMENDED RULE 28.1 STATEMENT

Because American Telephone and Telegraph Company (AT&T) and its affiliates were reorganized on January 1, 1984, petitioners amend their Rule 28.1 Statement as follows: Petitioners Western Electric Company and Bell Telephone Laboratories are wholly-owned subsidiaries of AT&T. AT&T has no parent company. In addition to other wholly-owned subsidiaries, AT&T has ownership interests in the Southern New England Telephone Company, Cincinnati Bell, Incorporated, and the Cuban American Telephone and Telegraph Company.

Petitioner New York Telephone Company is a wholly-owned subsidiary of NYNEX Corporation. Petitioner New Jersey Bell Telephone Company is a wholly-owned subsidiary of Bell Atlantic Corporation. Petitioner Southern Bell Telephone and Telegraph Company is a wholly-owned subsidiary of BellSouth Corporation. Petitioner Ohio Bell Telephone Company is a wholly-owned subsidiary of American Information Technologies Corporation. Petitioner Southwestern Bell Telephone Company is a wholly-owned subsidiary of Southwestern Bell Corporation. Petitioner Pacific Telephone and Telegraph Company is a wholly-owned subsidiary of Pacific Telesis Group. Petitioner Pacific Northwest Bell Telephone Company is a wholly-owned subsidiary of U S West, Inc.

NYNEX Corporation, Bell Atlantic Corporation, BellSouth Corporation, American Information Technologies Corporation, Southwestern Bell Corporation, Pacific Telesis Group, and U S West, Inc. are each separately owned companies; none has a parent company, and none has ownership interests in companies other than wholly-owned subsidiaries.

No. 82-2128

IN THE

Supreme Court of the United States

October Term, 1983

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Petitioners,

vs.

LITTON SYSTEMS, INC., et al.,

Respondents.

PETITIONERS' REPLY TO AMICUS CURIAE BRIEF OF THE UNITED STATES

It should come as no surprise that the Department of Justice has opposed Bell's petition for certiorari. In *United States* v. *AT&T*, No. 74-1698 (D.D.C.), the Department vigorously contended that Bell's opposition to certification in 1973 was a "sham" and an antitrust violation, and it relied on the same Bell pleadings, speeches, and internal documents that Litton relies upon for its claim.[1] Judge Harold H. Greene held that this evidence is insufficient to constitute a sham, as a matter of law, and that the legal standards that the Department urged would "chill" and penalize constitutionally protected advocacy. *United States* v. *AT&T*, 524 F.Supp. 1336, 1361-64 & n. 110 (D.D.C. 1981). But this holding appears to have made the Department an even more determined advocate. Its Brief analyzes neither the appropriate legal standards nor the legal and economic importance of this case. Instead, it obscures the issues by repeatedly invoking conclusory statements and rhetoric from Litton's "version" of the facts—without even stating what it was that Bell actually said.

What is surprising about the Department's Brief, however, is that it takes these positions while *simultaneously confessing* that

[1]*Compare* Plaintiff's Memorandum In Opposition To Defendant's Motion For Involuntary Dismissal Under Rule 41(b), *United States* v. *AT&T*, No. 74-1698 (D.D.C.) (Filed Aug. 16, 1982), pp. 324-350, *with* Pet. App. 24a-33a, 47a-54a. The Department had worked closely with Litton's counsel and introduced evidence directly from the Litton case into the record in the Government case.

the Second Circuit's decision rests on a fundamental and systemic error: the premise that the jury was entitled to find that the FCC's "mandate in *Carterfone*" and *Hush-A-Phone* meant "that AT&T could not exclude 'any device'—a category clearly including telephone terminal equipment—absent a showing of actual harm." Compare Pet. App. 51a, with U.S. Br. 20-21 (conceding the correctness of Petn. 6-9). This confession of error highlights the legal, economic, and national significance of this case.

First, the error that the Department has confessed occurred only because the lower courts fundamentally misconceived the *Noerr-Pennington* doctrine and the First Amendment. The Department's own attempts to defend the judgment vividly reveal that if the distortion of constitutional principles is not corrected, advocacy that is at the heart of representative government will effectively be prohibited. Plenary consideration of this case would avoid these adverse effects and resolve the conflict among the courts of appeals. See Petn. 20-28.

Furthermore, the error that the Department has confessed has extraordinary and immediate consequences for the economy and for the administration of justice—all of which are ignored by the Department's Brief. The error produced a $276 million judgment. It can affect *twenty* pending cases and will clog federal courts with offensive collateral estoppel claims. See Petn. 28; Petr. Rep. Br. 10; Appendix A, *infra* (citing pending cases). The threatened aggregate liabilities are so great that they not only jeopardize ratepayers' interests, see NARUC Br. 1-2; they also cloud the just-completed reorganization of a vital national industry because the vast liabilities would be shared by each of the eight new entities created by the structural separation of the Bell System. See *id.; United States* v. *Western Electric Co.*, 569 F. Supp. 1057, 1069-78, (D.D.C. 1983), *aff'd*, 52 U.S.L.W. 3450 (Dec. 12, 1983). A decision permitting this case and the twenty pending cases each to be decided *free* of the error that the Department confesses and *free* of the misinterpretation of *Noerr-Pennington* would have tremendous national importance,[2] even apart from the

[2]The Department is in error in stating that Bell is seeking to "insulate" itself from liability for all the acts Litton alleged. U.S. Br. i. Bell is not

(Footnote continued on following page.)

long term importance of the legal questions. In any event, the Department having confessed that a fundamental error "influenced" the Second Circuit's decision to affirm this extraordinary judgment (Br. 21) and Bell having argued that this false premise vitiates the judgment (Petn. 3-14, 17-19, 27, 30), the Court, at a minimum, should vacate the Second Circuit's judgment and remand for reconsideration in light of the error that the Department has confessed.

I. The Confession Of Error Vitiates The Judgment.

Although the Department devotes most of its Brief to defending the finding that Bell's opposition to certification was a sham, it also contends (Br. 11) that the finding that Bell filed its PCA tariff in bad faith in 1968 is an independent, "alternative basis" for the judgment. It claims (Br. 21) that this finding and the $276 million judgment can be sustained on the ground that Bell knew the PCA was "not necessary to prevent harm to the Bell network," despite the confession of error. Neither claim withstands analysis.

First, this judgment rests exclusively on the finding that Bell opposed certification in bad faith in 1973, for that was the basis for Litton's claim of antitrust injury.[3] The testimony of Litton's President, its jury argument, its business plan, and its damages evidence all made it explicit that Litton's claim at trial was that it was driven from the relevant markets by Bell's announcement in 1973 of its opposition to an FCC-administered system of standards. See Pet. App. 21a, 31a; Petr. Rep. Br. 2-4. Similarly, the terms of the jury verdict and the conditions under which it was entered demonstrates that the jury accepted Litton's argument

(Footnote continued from preceding page.)
contending it is immune from liability and is not seeking the entry of judgment in its favor. The case should be retried free of the errors which infect the present judgment. See Petn. 16 n. 10.

[3]The Department's arguments overlook that it is no longer prosecuting *United States* v. *AT&T*. Whereas antitrust injury need not be proved a Government action for equitable relief, compare *United States* v. *AT&T*, *supra*, 524 F.Supp. at 1344-45, it is an essential element in a private action for money damages and determines the conduct for which damages may be awarded. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

and found that it was Bell's opposition to certification in 1973 that injured and damaged Litton, not the filing of the tariff in 1968. *Id.* at 4.[4] In any case, no one disputes that, at the very least, some portion of the massive judgment rested upon, or was tainted by, the jury finding that Bell's participation in the national debate in 1973 was unlawful. The judgment, accordingly, cannot be affirmed without ruling on the protected character of Bell's opposition to certification. See *Mt. Healthy City School Dist. Bd. of Ed.* v. *Doyle*, 429 U.S. 274 (1977); *Street* v. *New York*, 394 U.S. 576, 586-90 (1969).

Second, in any event, the Department's confession of error vitiates the jury's findings on both the protected character of Bell's opposition to certification in 1973 and the lawfulness of the initial filing of the PCA tariff in 1968. The confession of error eliminates the very premise of the claims that Litton submitted to the jury on each issue.

At every stage of this litigation, Litton has stated that its claims depend on a single premise about the regulations existing between 1971 and 1974: that Bell's *lawful* monopoly included only central switching systems and the wires that connect them to its customers' premises and that its monopoly over telephone instruments was then *unlawful*. See Resp. Opp. 2. In Litton's view, the customers' "jack" or "plug" was then the line that divided the regulated telephone monopoly from the competitive aspects of telecommunications. Litton assumes that *Hush-A-Phone* and *Carterfone* not only make this explicit, but also provided that no restriction on customer-provided network control signalling units would be valid unless Bell had actual incontrovertible proof that technical standards could not adequately protect the network from harm. Resp. Opp. 3. Under Litton's version of the then

[4]This is just common sense. The filing of tariff could not have driven Litton from the PBX and key system market; the tariff *opened* the markets to competition and allowed Litton's entry in 1971. Moreover, Litton had wanted the PCA tarifff to *remain* in effect until 1973 and then be replaced by an FCC-administered system of standards established in a rulemaking proceeding (*not* by a carrier-administered system established by a tariff filing). See Pet. Rep. Br. 4.

existing regulations, Bell could not justify or even advocate a PCA requirement on *any other ground.* Once this version of the regulations is adopted, moreover, it was, *a fortiori*, that Bell's opposition to certification and its filing of the PCA tariff could be found an antitrust violation; Bell *never claimed* it had incontrovertible scientific proof of harm, but advocated the PCA for other reasons.[5]

By confessing that neither *Carterfone* nor *Hush-A-Phone* gave customers a right to provide their own "harmless" telephone instruments and that it was then an open question whether customers would ever be given that right, the Department has eliminated the whole premise for Litton's judgment. The State regulations that *included* telephone instruments in the franchised monopolies had, the Department admits, simply not been preempted by *Carterfone* or *Hush-A-Phone.* The line that established the outer limit of Bell's lawful monopoly had then been drawn at the telephone instrument, not the jack.[6]

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[5]Bell had argued that there was a *potential* for harm—which the National Academy of Sciences had found and which all conceded, *including* Litton. See Petr. Rep. Br. 5 n. 8. Bell had based its opposition to certification and advocacy of the PCA alternative almost exclusively on grounds that were wholly unrelated to whether adequate standards could be drafted. In Bell's FCC pleading that opposed certification, 246 of the 251 pages were devoted to issues *other* than whether customer provided equipment would harm the network. See Petn. 11-12.

[6]It is the States who issue the franchises and initially define them. See Petn. 4-5, 7-12. Because the state definitions of the scope of the monopoly are valid unless and until preempted by federal authority, a determination of where the line has been drawn at any particular time depends on the extent to which state definitions had been preempted.

There have been four such definitions during this century. (1) The States initially defined the monopoly as the telephone instrument *and* anything attached to it. Petn. 4-5. (2) *Carterfone* redefined the monopoly as including telephone instruments, but as *excluding* equipment attached to them. Petn. 5-6. (3) The States all initially accepted Bell's post-*Carterfone* tariffs, which redefined the monopoly as including the network control signalling unit, but not the telephone instrument. When some States proposed rolling back this definition, the FCC, in 1974, decided it could and would preempt the state law definitions to the extent that they were inconsistent with those tariffs. See *Telerent Leasing Corp.*, 45

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The Department's attempt to defend the judgment on the ground that Bell knew that its adoption of the PCA requirement in 1968 was not "necessary to prevent harm to the Bell network" is a *non sequitur*. Its confession of error establishes that Bell was then acting within its lawful monopoly. It could have continued to bar its customers from providing their own telephone instruments but *voluntarily* opened the PBX and key system markets to competition. As even the Department acknowledges (Br 21 n.21), Bell was entitled to take into account established regulatory policies *unrelated* to the risks of harm in deciding not voluntarily to relinquish more of its monopoly. There clearly were such regulatory justifications for the PCA requirement in 1968. It would have flatly contravened a host of economic, social, and other longstanding regulatory policies of the States—which had not then been preempted—if Bell had permitted its customers to provide their own network control signalling units. Moreover, the only alternative to the PCA that *Bell* could have adopted by tariff was a *carrier*-administered system of standards, but that would have produced enormous antitrust and regulatory problems—as the FCC's *current* regulations demonstrate.[7] See also Radiant Burners, Inc. v. *Peoples Gas, Light, & Coke Co.*, 364 U.S. 656 (1961). In short, even if the finding that Bell filed the PCA tariff in bad faith could support the judgment, the finding is not sustainable; the jury instructions were erroneous.[8] Petn. 16, 27-28.

(footnote continued from previous page)
F.C.C.2d 204 (1974). Its authority to do so was upheld in a 2-1 decision in *North Carolina Utilities Comm'n.* v. *FCC*, 537 F.2d. 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). (4) Finally, in 1976, the FCC again preempted the States and redefined the monopoly as including the "jack" or "plug," but as excluding network control signalling units. Resp. App. 76a.

[7]When the FCC did preempt the States and adopt the jack as the boundary between the monopoly and competitive aspects of telecommunications in 1976, it did so *only* with respect to equipment that *it* had certified as safe. It prescribed the use of PCAs with all unregistered equipment (irrespective of any proof of actual harm). Petn. 13-14. To this day, the FCC has refused to require carriers to interconnect any equipment that the *FCC* has not certified as safe.

[8]The Department's reliance (Br. 16-17) on Judge Greene's decision on this point is mystifying. He held only that the Department had made out

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Finally, the Department's confession of error even more clearly demonstrates the conduct that is the basis for the judgment—Bell's opposition to certification in 1973—cannot be condemned as a "sham" simply because Bell lacked strict proof of actual harm. *Noerr* teaches that Bell would have had a constitutional right to defend its monopoly against federal preemption in a legislative rulemaking proceeding on any ground whatsoever, even if the regulatory framework had been as Litton claims. Because the Commission's *Notice of Inquiry* made it explicit that it believed that certification might not be in the public interest *even if* a standards program could adequately protect the network, see Pet. App. 177a, Bell plainly had a right to base its opposition on such traditional public interest concerns as the effects of certification on residential telephone rates and the cost and quality of telephone service. See Petn. 10-12.

II. Bell's Opposition To Certification Could Not Be Condemned As A Sham Under This Court's Decisions And Those Of Other Courts Of Appeals.

The Department's alternative defense of the verdict—that Bell's opposition to certification was a sham—demonstrates the importance of plenary review. The Department is urging a fundamental transformation of *Noerr-Pennington* that would profoundly inhibit advocacy of issues of great public importance and strike at the very heart of representative government.

The error that the Department has confessed occurred because the Second Circuit did not determine the meaning of the existing regulations itself, but held that a jury could permissibly adopt the erroneous Litton "version." See Petn. 24-25. But the Department fails to acknowledge the full dimensions of this error; it rested on a fundamental misconception of the First Amendment. The First Amendment requires a careful *judicial* assessment of public statements to determine "whether they are of a character which the principles of the First Amendment protect," *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946), and present questions of law

a prima facie case that the filing of the PCA tariff was unlawful, and he had *reserved* the issue of the significance of the regulatory justifications for Bell's conduct. See *United States* v. *AT&T*. *supra*, 524 F.Supp. at 1348-52 & 1357-60.

for the court. *Connick* v. *Myers*, 103 S. Ct. 1684, 1690 n. 7, 1692 n. 10 (1983); see Petn. 22 nn. 14-15. The protected character of speech is not an ordinary jury question.

Yet the Department defends the verdict by simply stating that a jury could have accepted Litton's rhetoric and labeled Bell's opposition to certification "baseless," and a "misrepresentation." The Department gives these terms no content and would provide no meaningful limits on a jury's discretion to condemn advocacy on impermissible grounds. The Department's notion is that whether these labels can be affixed to particular advocacy is simply a matter for the trier-of-fact to determine on the basis of some unstructured consideration and weighing of (1) the likelihood that the advocacy would be successful (Br. 11); (2) the extent to which the factual premises of the position were strictly accurate and scientifically verifiable (*id.* 14); and (3) the competitive consequences of the position that has been urged (*id.* 9). But to give the sham exception such indeterminant and elastic meaning will inevitably inhibit constitutionally protected speech and is flatly inconsistent with *Noerr*.

The Department's arguments that Bell's advocacy was properly found to be "baseless" vividly demonstrate the point. In opposing certification, Bell advocated a position that the Commission *stated it was considering* and upon which it expressly invited comment in the very *Notice of Inquiry* to which Bell was responding —maintenance of the *status quo*. See Petn. App. 184. Bell's position was further supported by two FCC Commissioners, the Federal-State Joint Board that sat as the Administrative Law Judge, state commissions, and numerous other representatives of the public interest. Bell's concerns were so widely shared that no one could have believed at the time that Bell's position was "baseless" or certain to be rejected. Indeed, intervening events have demonstrated that the States and Bell were right—and the FCC was wrong—about the principal issue in this public debate: whether the FCC's new policies would lead to sharp future increases in local rates.[9]

[9]See, *e.g.*, *Universal Telephone Service Preservation Act of 1983: Joint Hearings before the Senate Committee on Commerce, Science,*

(Footnote continued on next page)

The Department ignores the objective reasonableness of Bell's position and, instead, extrapolates from internal Bell documents to infer that Bell knew the PCA was indefensible and that certification was inevitable. As Judge Greene held, the ambiguous statements from the internal Bell documents are insufficient as a matter of law to convert Bell's objectively reasonable advocacy into a sham. They are from documents discussing *different* proposed PCAs or *different* tariffs and pertain to *one side* of an internal debate occurring 2 to 5 years *before* the FCC issued its Notice of Inquiry in 1973. Petr. 24-26; Petr. R. Br. 6 n.10. In contrast, the record shows that, at the time Bell filed its comments, most of its management believed that, while difficult, it and the States could prevail before the FCC, especially if the public could be led to understand the consequences of certification. Fundamental constitutional values would literally "go for naught" if advocacy of public interest questions could be converted into an antitrust violation on such flimsy grounds. See *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-39 (1961).

Significantly, the Department does not attempt to explain how what Bell actually said could possibly constitute a "misrepresentation" that would subvert the administrative process. What Bell did was *truthfully* to disclose the results of studies and state an opinion that this evidence was "sufficiently consequential" to be circumstantial evidence that increased interconnection of customer-provided equipment had an adverse effect on service quality. As Judge Greene held, such statements cannot be a sham. Where, as here, the background facts are disclosed, nothing has been "concealed," nothing can go "unnoticed," and the integrity of government processes cannot be subverted. *United States* v. *AT&T*, *supra*, 524 F.Supp. at 1363-64. In contrast, the implications of the Department's position are simply staggering. It would apparently impose an affirmative duty on all regulated firms to make no statements that are not scientifically verifiable—even in *legislative* rulemaking proceedings—and to act as insurers of the accuracy of everything that they say. See U.S. Br. 14. This rule will expose future participants in public debates to crippling antitrust judgments where, as here, what is said is reasonable at the

and Transportation and the House Committee on Energy and Commerce, 98th Cong., 1st Sess., (July 28-29, 1983).

time and not contradicted by any known facts. The inevitable result would be to inhibit the flow of information and ideas, prevent ordinary statements of opinion, and impair representative government itself.

The Department's argument (Br. 11-12 & n. 12) that antitrust laws *should* have inhibited Bell's advocacy before the FCC in 1973 and *should* have prevented John deButts from giving the public speech in which Bell instituted its campaign to educate the public on the effects of certification is supremely ironic. The Bell System is being criticized by the public today because it did not say *more* to alert the public as to consequences of the competitive policies that the FCC began to pursue in the early 1970s. Yet if it had been clear in 1973 that Bell's advocacy would be transformed into a sham and penalized with a $276 million judgment, Bell would not have said anything at all. How can such a result be squared with the First Amendment?

CONCLUSION

The petition for a writ of certiorori should be granted; alternatively, the judgment should be vacated and the case remanded for reconsideration in light of the Department's confession of error.

Respectfully submitted,

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January 5, 1984

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APPENDIX

There are now 20 pending cases that present the identical claims as this case:

General Dynamics Corp. v. *AT&T*, No. 82-C-7941 (N.D.Ill.).

Glictronix Corp. v. *AT&T*, No. 82-4447 (D.N.J.).

Gregg Communication Systems v. *AT&T*, No. 82-C-6291 (N.D.Ill.).

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Phonetele, Inc. v. *AT&T*, No. 74-3566-FW (C.D.Cal.).

Rice International Corp. v. *AT&T*, No. 82-2573 (S.D.Fla.).

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Interconnect Resources Corp. v. *AT&T*, No. 83 Civ.P. 7002 (KTD). (S.D.N.Y.).

American Business Communications Inc. v. *AT&T*, No. 83-1261 (D.Ore.).

Am/Comm Inc. v. AT&T, Civ. Action 83-4122 (E.D.Pa.) (and two consolidated cases).

Metropolitan Interconnect Telecommunications Corp. v. *AT&T*, 83 Civ. 6161 (ADS) (S.D.N.Y.).

Design Communications, Inc. v. *AT&T*, No. 83-2076-Civ.-SMA (S.D.Fla.).

No. 82-2128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

v.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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Respondents ("Litton") oppose the Motion for Leave to File Brief Amicus Curiae which has been made by the National Association of Regulatory Utility Commissioners

("NARUC"). Ordinarily, Litton would not oppose a motion for leave to file an amicus curiae brief by an interested party and would consent to such filing even where it disagreed with the views expressed therein. Here, however, the Motion is based on plain errors of fact. Accordingly, Litton cannot consent to the Motion and is impelled to point out the errors therein to this Court.

NARUC asserts two reasons for granting the Motion: First, if the petition herein is not granted, the local Bell operating companies "will be liable" for a portion of the judgment under the contingent liability provision of the AT&T divestiture plan in the Government case (Motion at iii); and second, this "amount will, either directly or indirectly, ultimately be recovered from the Operating Company's local ratepayers." *Id.* Both propositions are palpably wrong.

First, the contingent liability provision of the divestiture plan does not become effective until January 1, 1984. Thus, if this Court denies AT&T's petition at the beginning of the October 1983 term, AT&T will be obligated to pay the judgment and the contingent liability provision of the divestiture plan will not apply.

Second, if AT&T, as the controlling parent, should make any of its subsidiary operating companies pay any part of the judgment, the state regulatory agencies have full authority to disallow such payment from being passed on to the ratepayers.[1] The regulatory agencies

[1] The trial court specifically ruled on this point in an order dated October 1, 1981: "Any attempt by defendants [AT&T] to pass along to their customers the costs of this action, including the damages awarded against them, is a matter for consideration, at least in the first instance, by the various regulatory agencies responsible for approval of defendants' rate structures." *Litton Sys. v. AT&T Co.*, 76 Civ. 2512 (WCC) (S.D.N.Y. Oct. 1, 1981) (Order denying Litton's request for equitable relief).

Before entry of this order, AT&T admitted this was the case when it argued: "The regulatory commissions have the exclusive

could instead require that such payment be made from equity or net profit of the Operating Company and not be included in the rate base. In any event, payment of the judgment here would represent only two percent of AT&T's net profits.[2] Finally, AT&T's petition raises no issue of who is to pay the judgment.

The amicus brief itself, while short, is misinformative both in expressing views regarding AT&T's "intentions" and in the application of the *Noerr-Pennington* doctrine to the facts of this case. NARUC is in no position to tell this Court what AT&T "truly sought" or what its "reasonable expectation" was or that there is "no evidence that AT&T's conduct was intended to injure Litton directly. . . ." Amicus Brief at 4. The jury found, based upon overwhelming evidence presented in a five-month trial, that AT&T wilfully maintained its monopoly of the terminal equipment market through various predatory and anticompetitive practices, and that determination was sustained by the trial court and the Second Circuit. Brief for the Respondents in Opposition at 10-15. Based on a thorough review of the trial record, the Second Circuit found the evidence "sufficient, both in terms of its weight and from the standpoint of causation." Pet. App. 6a-7a. NARUC was not involved in the trial, and it did not even attend it. Its Motion and Brief evidence no familiarity at all with the more than 18,000 pages of trial transcript and the 945 trial ex-

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jurisdiction to determine what expenses are allowable for rate making purposes, and if this award is not reversed it is the commissions that are empowered to determine the extent to which defendants are entitled to recover through the rate structure the amount of the judgment and other expenses of this case." Defendants' Memorandum In Opposition to Plaintiffs' Request for Equitable Relief (Sept. 11, 1981) at 11.

[2] AT&T profits after taxes last year were $7.2 billion. Under the judgment in this case, AT&T's after-tax liability would be approximately half the amount of the judgment, which is only two percent of its total after-tax profits last year.

hibits. With no knowledge of the trial record and an argument that only summarizes AT&T's position, NARUC has nothing to contribute with respect to the disposition of AT&T's petition.

For these reasons, we submit that NARUC's Motion for Leave to File Brief Amicus Curiae should be denied.

Respectfully submitted,

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August 1, 1983